(1)

Supreme Court, U.S.
FILED

981508 MAR 8 1999

OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

.....

THOMAS HAROLD LAKE AND ROSE C. LAKE,
Petitioners.

v.

ROBERT E. RUBIN, SECRETARY
OF THE TREASURY OF
THE UNITED STATES,
Respondent.

.....

On Petition For A Writ of Certiorari To The United States
Court of Appeals For the District Of Columbia Circuit

.....

PETITION FOR WRIT OF CERTIORARI

.....

Fred A. Ohlinger,
(counsel of record)

Fred A. Ohlinger, Esq.
601 East Twiggs Street
Suite 100
Tampa, Florida 33602
(813) 277-0236
Attorney for the Petitioners.

9 pp

QUESTIONS PRESENTED

I. WHETHER IT WAS THE INTENT OF CONGRESS TO EXEMPT THE INTERNAL REVENUE SERVICE (IRS) FROM CIVIL LIABILITIES UNDER THE PRIVACY ACT, 5 U.S.C. 552a(g)(1)(B), (3)(A) & (4) FOR FAILURE TO PRODUCE INFORMATION TO ANY REQUESTOR THAT RELATE DIRECTLY OR INDIRECTLY TO THE DETERMINATION OF THE EXISTENCE OR POSSIBLE EXISTENCE OF LIABILITY OF ANY PERSON FOR ANY TAX, PENALTY, INTEREST, FINE, FORFEITURE, OR OTHER IMPOSITION OR OFFENSE AS ADJUDICATED BY THE DISTRICT OF COLUMBIA, SIXTH, SEVENTH, AND NINTH CIRCUIT COURTS OF APPEALS IN LIEU OF 5 U.S.C. § 552a (d)(2), (3) and (4), and (g) PURSUANT TO 26 U.S.C. §7852(e);

II. WHETHER IT WAS THE INTENT OF CONGRESS TO PROMULGATE THE UNDERLINING LANGUAGE OF § 552a(g)(1)(B), (3)(A) & (4) OF THE PRIVACY ACT PURSUANT TO 26 U.S.C. §7852(e) TO CONNOTE THAT THE INTERNAL REVENUE SERVICE IS EXEMPT UNDER THE PRIVACY ACT FROM CIVIL SUIT BY A REQUESTOR ONLY TO THOSE SPECIFIC RECORDS WHICH IT CANNOT PRODUCE THAT DO NOT RELATE DIRECTLY OR INDIRECTLY TO THE DETERMINATION OF EXISTENCE OR POSSIBLE EXISTENCE OF LIABILITY AND JURISDICTION OF THE DISTRICT COURT AS DEFINED UNDER 5 U.S.C. § 552a(g)(1)(B), (3)(A) & (4) PURSUANT TO 26 U.S.C. §7852(e);

III. WHETHER 5 U.S.C. § 552a (d)(2), (3) and (4), and (g) OF THE PRIVACY ACT IN LIEU OF 26 U.S.C. § 7852(e) OF THE INTERNAL REVENUE CODE IS IN CONFLICT WITH THE FIFTH AMENDMENT OF THE CONSTITUTION BY NOT ALLOWING OR PERMITTING DUE PROCESS BY A REQUESTOR AGAINST SAID AGENCY OF THE GOVERNMENT FOR WRONGFUL ACTS OR REFUSAL TO LEGALLY COMPLY UNDER THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974.

CERTIFICATE OF INTERESTED PARTIES

Parties listed alphabetically in D.C. Circuit

No.	Party	D.C. No.
1.	Joseph F. Aiello and Catherine Aiello	98-5286
2.	Joseph P. Aiello and Kerrie Aiello	98-5308
3.	Richard L. Aitkins and Bettie A. Aitkins	98-5193
4.	Emmett R. Albrecht and Dorothy A. Albrecht	98-5293
5.	Nevin S. Alwine and Nahawee Alwine	98-5290
6.	Rhoe Merlin Apt and Peggy Jean Apt	98-5210
7.	James P. Baker	98-5208
8.	James C. Balvich and Kelly Balvich	98-5309
9.	Lewis E. Barger	98-5267
10.	Harland J. Beach and Phyllis K. Beach	98-5310
11.	Wesley John Bevins	98-5202
12.	Guy Blackwell	98-5295
13.	Tom H. Boode-Peteresen	98-5197
14.	Albert Bruce Bresciani and Marie Bresciani	98-5222
15.	Robert E. Busche, Jr.	98-5187
16.	Sylvester Henry Cain	98-5206
17.	Robert Case	98-5302
18.	Steve L. Chamberlain & Karen E. Chamberlain	98-5292
19.	James R. Chambers	98-5307
20.	Robert Morris Clinehens	98-5205
21.	Hubert A. Corbe, Jr.	98-5303
22.	James Craig Courtade & Catherine Alice	98-5311
23.	Marios Coutsoftides & Christine Coutsoftides	98-5297
24.	John Michael Coy, Angela M. Fowler, Lamont Kutchinski, Thomas Olan Maxton, Linda J. Maxton, Paul & Donna G. Paul , Robert E Nolan, Thomas D. Selgas & Michelle L. Selgas.	98-5223
25.	William P. Crowley & Leodon Crowley	98-5301
26.	David S. Crymes and Mary R. Crymes	98-5195
27.	Charles Henry Curtis & Joan H. Curtis	98-5300
28.	William Thad Davis Jr.	98-5185
29.	Alain Rene' Dery & Debra Sue Dery	98-5314
30.	Lamar Dingler	98-5287
31.	Mark William Dion & Kathlyn v. Dion	98-5220
32.	Burton P. Dupy, Jr. & Yvonne W. Dupuy	98-5284

33.	Michael Scott Farmer	98-5218
34.	Albert S. Farver & Marjorie H. Farver	98-5273
35.	Frederick M. Fox	98-5188
36.	Larry R. Fritsche & Patricia A. Fritsche	98-5194
37.	Jack E. Fyke	98-5285
38.	Michael W. Gonet & Reesa T. Richman	98-5199
39.	Kathryn L. Graham	98-5299
40.	Robert H. Hale and Catherine S. Hale	98-5304
41.	Kevin B. Haydel	98-5280
42.	J. G. Henderson & Teofanesa A. Henderson	98-5298
43.	Joseph K. Hilyard & Susan P. Hilyard	98-5211
44.	Mark Edward Hopkins & Sharon June Hopkins	98-5306
45.	Kent E. Hovind & Jo Delia Hovind	98-5278
46.	Robert D. Huff	98-5305
47.	Charles S. Ivy & Penni L. Ivy	98-5296
48.	John Januska	98-5271
49.	Howard S. Jeck	98-5212
50.	Claude R. Johnson	98-5276
51.	Deborah A. Jones-Williams	98-5289
52.	James T. Kearse & Eloise C. Kearse	98-5198
53.	Clifford L. Kidd, Jr. & Dawn C. Kidd	98-5201
54.	Vernice B. Kuglin	98-5221
55.	J. Packard Laird	98-5272
56.	Thomas Harold Lake & Rose C. Lake	98-5009
57.	Franklin Lewis and Cleo Lewis	98-5313
58.	Kenneth J. Lewis	98-5270
59.	Arthur W. Marron & Donna H. Marron	98-5312
60.	Stephen Lawrence Maxwell	98-5184
61.	Marlin R. McCaffree & Susan K. McCaffree	98-5213
62.	Charles D. McClure & Connie M. Mc Clure	98-5316
63.	John F. Medeika	98-5315
64.	George Victor Minovich & Sue Ann Minovich	98-5277
65.	Richard E. Morgan & Mary Addington Morgan	98-5217
66.	Henry Nino & Janet Nino	98-5215
67.	Kirk S. Patterson & Dana K. Patterson	98-5269
68.	Clarence G.. Punke & Brenda K. Punke	98-5190
69.	Andre Rattelade	98-5288
70.	Fred L. Rawlings & Helen R. Rawlings	98-5274
71.	Carl Robert Richards & Mary Ellen Richards	98-5275

72.	Gregg Howard Risner	98-5207
73.	Alan J. Robinson & Cindy L. Robinson	98-5196
74.	Michael Sawukaytis	98-5189
75.	George L. Schmitz	98-5291
76.	Kenneth C. Shahan	98-5214
77.	Paul R. Shepherd & Connie L. Shepherd	98-5209
78.	Joseph Sherman	98-5279
79.	Thomas B. Sleepe & Patricia A. Sleepe	98-5268
80.	Robert Lewis Spears & Mary E. Spears	98-5191
81.	Louie E. Strawder & bonita B. Strawder	98-5266
82.	Charles Dewey Tobias	98-5192
83.	William H. Ulrich	98-5283
84.	David E. Vette & Janet M. Vette	98-5219
85.	Burke A. Walker & Darlene R. Walker	98-5281
86.	Geoffrey L. Ward	98-5216
87.	David D. White	98-5203
88.	Larry Williams	98-5204
89.	Stephen W. Williams	98-5200
90.	Eldon Woodock	98-5294
91.	Roger C. Wydner	98-5186
92.	Jerry Allen Zeigler & Phyllis Jean Ziegler	98-5282

Parties whose cases have not been appealed to the court.

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93.	Stephen R. Barker & Deborah M. Barker	1717
94.	Hilary M. Beck & Marilyn J. Beck	1718
95.	John W. Chandler & Robin K. Chandler	1719
96.	Robert J. Demer, Jr. & Jacqueline A. Demer	1720
97.	Robert Harms and Deloris Harms	1721
98.	David G. Heille & Nancy L. Heille	1706
99.	Steadman S. Jackson & Renee L. Jackson	1705
100.	Carol Tucker Janus	1709
101.	Paul Jolly & Ashley Jolly	1684
102.	James E. Kincaid & Joyce W. Kincaid	1708
103.	John A. Sardella	1726
104.	James E. Stafford & Charol L. Stafford	1728
105.	Stephen B. Teeple & Cherie D. Teeple	1751
106.	Michael D. Stokes	1754
107.	John W. Stucky	1752

108.	Frances J. Teschke & Edward Teschke	1752
109.	Gary G. Thompson & Margaret O. Thompson	1753
110.	David Warren	1764
111.	Stephen E. Wild & bonnie K. Wild	1763
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113.	Mike A. Woodard & Debra Woodard	1766
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Other numerous interested parties that Judge Friedman applied to the District Court Memorandum filed April 13, 1998, have not, as of this date, appealed to this Court and are not named at this time although their cases are listed sequentially by number.

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1. Thomas Harold Lake and Rose C. Lake, v. Robert E. Rubin, Secretary of the Treasury of the United States, No. 98-5009, (Dist. Of Columbia December 11, 1998)
2. Excerpt from Memorandum Opinion of Judge Paul L. Friedmank, of the United States District Court For The District Of Columbia, April 22, 1998, Nos: 97-2768(PLF), 97-2769(PLF), 97-2770(PLF) and Consolidated Cases
3. argument excerpt from the Brief of the Plaintiffs/Appellants' (as presented by the petitoners to the U.S. Court of Appeals for the District of Columbia)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at Thomas Harold Lake and Rose C. Lake v. Robert E. Rubin, Secretary of the Treasury of the United States, No. 98-5009.

District Court Judge Paul L. Friedman entered a judgment in the United States District Court for the District of Columbia (District Court File No. 97-2767-WBB) against the petitoners on December 10, 1997. In two separate Memorandums (consolidated cases 97-2768-PLF, 97-2769-PFL and 97-2770-PLF), the Court's Memorandum to No. 97-2767-WBB. Excerpt of the Court's accompanying Memorandum Opinion dated on April 22, 1998 is attached to the appendix. Petitioner for rehearing was denied on March 2, 1999. No opinions given..

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia was entered Dec 11, 1998. The jurisdiction of this honorable court is invoked pursuant to
28 U.S.C. §1254.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS I1NVOLVED

The Fifth Amendment to the U.S. Constitution in relevant part states "No person shall be ... deprived of ... due process of law; ..." 5 USC 552a "Privacy Act of 1974, appropriately states that government shall maintain a system of records. The government shall upon request by an individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying

5 U.S.C. § 552a(g)(1)(B), (3)(A) & (4) provide a requester may bring civil action against an agency for injunctive relief and damages. 31 CFR Part 1 Subsection (c) Appendix B sets forth the procedures that have been established by the Internal Revenue Service for individuals to exercise their rights under the Privacy Act of 1974 (88 Stat. 1896) with respect to systems of records maintained by the Internal Revenue Service, including the Office of the Chief Counsel. The procedures contained in this section are to be promulgated under the authority of 5 U.S.C. 552a(f).

Tax Reform Act of 1976; a provision of the Internal Revenue Code - 26 U..S.C. § 7852(e) calls for a judgment dismissing the complaints for lack of jurisdiction under the Privacy Act, 5 U.S.C. § 552(a).

STATEMENT OF THE CASE

The Plaintiffs/petitioners, Thomas Harold Lake and Rose C. Lake, et al, and consolidated cases, (referred to in this petition as the "petitioners") brought a civil action under the Privacy Act of 1974, 5 U.S.C. § 552a in the United States District Court For The District of Columbia (case No. 97-2767-WBB consolidated with case Nos. 97-2768-PLF, 97-2769-PFL, 97-2770-PLF and other cases). Petitioners were deprived of property in violation of the Fifth Amendment of the United States Constitution. Petitioners requested information from and of the Internal Revenue Service that was to be disclosed under 5 U.S.C. § 552a that would reveal the Internal Revenue Service's legal authority over them. The district court had subject matter jurisdiction in this case by virtue of 28 U.S.C. § 1331, over their claims for injunctive relief resulting from the IRS's failure to disclose records in violation of (d)(1) and 5 U.S.C. § 552a(g)(1)(B), (C), and (D) where subsection (g) gives the individual a right to sue in district court for an injunction and damages if the agency refuses to amend the records. The district court dismissed the claims, ruling the federal courts lack jurisdiction over suits to enforce the Privacy Act against the Internal Revenue Service in which the Plaintiffs seeks to obtain records under 26 U.S.C. § 7852(e). The petitioners appealed their dismissal to the United States Court of Appeals for the District of Columbia, (case No. 98-5009, et al consolidated with Nos. 98-5184 through 98-5199, 98-200 through 98-5223, 98-5266 and 92-5267), which affirmed the petitioners

dismissal in diverse terms.

The core of the petitioners dismissal revolve around 26 U.S.C. § 7852(e) in lieu of the provisions of subsections (d)(2), (3), and (g) of § 552(a) of title 5, United States Code. The opinion of the Court and the district court suggests a misapprehension of the nature and purpose of the disclosure information requested by petitioners that resulted in the legal conclusion that the nature of the disclosure information requested is "return information" as defined under 26 U.S.C. § 6103(b) (2). Title 26, U.S.C. § 6103 had nothing to do with petitioners claims.

REASONS FOR GRANTING THE WRIT

I. TO EXEMPT THE IRS FROM CIVIL LIABILITIES UNDER THE PRIVACY ACT THAT RELATE DIRECTLY OR INDIRECTLY TO THE DETERMINATION OF THE EXISTENCE OR POSSIBLE EXISTENCE OF LIABILITY OF ANY PERSON FOR ANY TAX, PENALTY, INTEREST, FINE, FORFEITURE, OR OTHER IMPOSITION OR OFFENSE IN LIEU OF 5 U.S.C. § 552a (d)(2), (3) and (4), and (g) PURSUANT TO 26 U.S.C. §7852(e) CONTRAVENES THE CONGRESSIONAL INTENT.

The language of 5 U.S.C. § 552a(3)(A) embodies jurisdiction under the provisions of subsection (g)(1)(B) of this section. It authorizes the court to enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. This was the request of the petitioners. The IRS is provided with two protective measures revolving around "sensitive" or "best interests of the public" in failing to provide the information. (3)(A) provides for the court to determine such a matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action. No agency shall rely on any exemption contained in section 552a of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section, (t)(1). (B) (4)(A)(B) Illustrates the assessment that the court can make when it determines that the agency acted in a manner which was intentional or willful, including actual damages as well as

costs with reasonable attorney fees. (g)(1)(B) governs the refusal to comply.

31 CFR Part 1 Subsection (c) Appendix B promulgates the purpose of the Internal Revenue Service for individuals to exercise their rights under the Privacy Act of 1974 (88 Stat. 1896). The procedures under (d) outline whatever additional means may be necessary for individuals to be able to exercise fully their right under 5 U.S.C. 552a (5 U.S.C. 552a (f)(4)). In furtherance of promulgating a request, IRS defines: access to amendment of tax records (2) cannot be gotten through the provisions of the Privacy Act of 1974, but then allows under (iii) such a request shall contain a statement that it is being made under the provisions of the Privacy Act of 1974. At(3)(c) time and place for making a request . . . under the Privacy Act . . . (4)(ii)(iii) procedures for amendment of records of . . . shall be clearly marked . . . such request shall contain a statement that it is being made under the provisions of the Privacy Act of 1974. Under (d) time and place . . . A request to amend a record under the Privacy Act shall be . . . (f)(ii)(iii)(h) Administrative review of adverse determination shall be clearly marked . . . shall contain a statement that it is being made under the provisions of the Privacy Act of 1974; . . . A request for review of an adverse determination under the Privacy Act shall . . . (j)) . . . submit a statement of disagreement under 5 U.S.C. 552a(d)(3) . . . (K) Judicial review . . . if the request will not be granted or after expiration of 30 days action is not taken thereon in accordance with the requirements of paragraph (d)(9) of this section, an individual may commence an action within the time prescribed by law in a U. S. District Court pursuant to 5 U.S.C. 552(a(g)(1). The statute authorizes an action only against the agency. Allowing the dismissal of the petitioners claims would effectively contravene the Congressional intent and 31 CFR 1(c) App.B. By reversing the dismissal as contrary to Congressional intent, this honorable court would force the courts to adjudicate properly due process of these type cases for which the IRS is liable.

II. CONGRESS PROMULGATED THE UNDERLINING LANGUAGE OF § 552a(g)(1)(B), (3)(A) & (4) OF THE PRIVACY ACT PURSUANT TO 26 U.S.C. §7852(e) TO CONNOTE THAT THE INTERNAL REVENUE SERVICE IS EXEMPT UNDER THE PRIVACY ACT FROM CIVIL SUIT BY A REQUESTOR ONLY TO THOSE SPECIFIC RECORDS WHICH IT CANNOT

PRODUCE (PUBLIC HEALTH OR PUBLIC INTEREST) THAT DO NOT RELATE DIRECTLY OR INDIRECTLY TO THE DETERMINATION OF EXISTENCE OR POSSIBLE EXISTENCE OF LIABILITY AND JURISDICTION OF THE DISTRICT COURT AS DEFINED UNDER 5 U.S.C. § 552a(g)(1)(B), (3)(A) & (4) PURSUANT TO 26 U.S.C. §7852(e);

One of the reasons the courts creatively overlooked petitioners premises was due to IRS § 7852(e) including misapprehension by the court of the nature and purpose of the disclosure information requested by petitioners under 5 U.S.C. 552a, the Privacy Act. For purposes of this petition, the most important point is the fact that the findings of the court do not consist of § 6103 "tax information" or "return information". By the mis-apprehension of the nature of the petitioners individual disclosure requests and by overlooking that the petitioners have been stigmatized as taxpayers or subjects of Internal Revenue Service authority based on an assumption rather than the presentation of law and facts leading to a proper legal conclusion for the same, justice and due process are denied. Absent implementing regulations and absent requests for "tax information", "returns" or "return information", there exists no legal basis for depriving the petitioners of the rights and remedies provided to them by Congress under the Privacy Act.

The clear language of 5 U.S.C. 552a entitles the petitioners to obtain disclosure from the Internal Revenue Service of the information requested, if it exists. 5 U.S.C. § 552a(k)(1)(2)(3)(4)(5)(6) promulgate the only exemptions which exempt an agency from civil liabilities. For the courts to think otherwise encourages the arbitrary exempt status of IRS from the provisions of the Privacy Act, 5 U.S.C. § 552a(d)(2), (3) and (4) and discriminatory enforcement that federal courts therefore lack jurisdiction over suits to enforce the Privacy Act against the Internal Revenue Service pursuant to 26 U.S.C. §7852. This shortcoming in the courts runs afoul of the requirement that Congress has established. By reversing the petitioners dismissal the Court would provide proper direction to the courts and make IRS accountable in these cases.

III. 5 U.S.C. § 552a (d)(2), (3) and (4), and (g) OF THE PRIVACY ACT IN LIEU OF 26 U.S.C. § 7852(e) OF THE INTERNAL REVENUE CODE IS IN CONFLICT WITH THE

FIFTH AMENDMENT OF THE CONSTITUTION BY NOT ALLOWING OR PERMITTING DUE PROCESS BY A REQUESTOR AGAINST SAID AGENCY OF THE GOVERNMENT FOR WRONGFUL ACTS OR REFUSAL TO LEGALLY COMPLY UNDER THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974.

All of the issues enumerated above renders 5 U.S.C. § 552a(d)(2), (3) and (4), and (g) as applied under 26 U.S.C. § 7852(e) by the courts unconstitutionally void for abstruseness under the Fifth Amendment to the U.S. Constitution. The applications of IRS § 7852(e) violates petitioners Fifth Amendment right to due process and is repugnant to the Constitution. Defining the oversights of the courts would settle the clear intent of Congress as well as enforce 31 CFR 1(c) App. B (k) as applied to 5 U.S.C. § 552a(g)(1) and provide proper access by the petitioners to the district court to enforce disclosure by the IRS.

CONCLUSION

Based on the foregoing, this petition for a writ of certiorari should be granted.

Dated: March 04, 1999

Respectfully submitted,

FRED A. OHLINGER, P.A.

BY: _____

Fred A. Ohlinger
FBN 196830
601 East Twiggs Street Suite 100
Tampa, Florida 33602
(813) 277-0236

APPENDIX

1. Excerpt from Opinion of the United States Court of Appeals for the District of Columbia, Thomas Harold Lake and Rose C. Lake, v. Robert E. Rubin, Secretary of the Treasury of the United States, No. 98-5009, (Dist. Of Columbia December 11, 1998)
2. Excerpt from Memorandum Opinion of Judge Paul L. Friedmank, of the United States District Court For The District Of Columbia, April 22, 1998, Nos: 97-2768(PLF), 97-2769(PLF), 97-2770(PLF) and Consolidated Cases
3. argument excerpt from the Brief of the Plaintiffs/Appellants' (as presented by the petitioners to the U.S. Court of Appeals for the District of Columbia)

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 5, 1998 Decided December 11, 1998

No. 98-5009

THOMAS HAROLD LAKE AND ROSE. C. LAKE,
APPELLANTS

v.

ROBERT E. RUBIN,
SECRETARY OF THE TREASURY OF THE UNITED STATES,
APPELLEE

Consolidated with Nos.
98-5184, 98-5185, 98-5186, 98-5187, 98-5188, 98-5189
98-5190, 98-5191, 98-5191, 98-5193, 98-5194, 98-5195
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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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Fred A. Ohlinger argued the cause for appellants. With him on the briefs was *J. Hamilton Mc Menamy*.

Murray S. Horwitz, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were *Loretta C. Argrett*, Assistant Attorney General, *Wilma A. Lewis*, U.S. Attorney, and *Jonathan S. Cohen, Attorney*, U.S. Department of Justice. *Curtis C. Pett* and *Gary W. Allen*, Attorneys, entered appeaarnces.

Before: HENDERSON, RANDOLPH, AND TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: These are consolidated appeals from district court judgments dismissing, for lack of jurisdiction, one hundred and thirty-eight complaints. Though filed by different individuals, each complaint contained the same cause of action. The action filed by Thomas H. and Rose C. Lake is typical. The lakes sought injunctive and declaratory relief, and damages. The Internal Revenue Service, their complaint alleged, failed to comply with the Lakes' written request, "[p]ursant to the requirements of the Privacy Act at 5 USC 552(a)(d)(1)," for the disclosure for information explaining "adverse determinations" made by hte IRS regarding

their tax liability. According to the government, the IRS has received hundreds of identical, or nearly identical, requests from individuals around the country.

The Lakes relied on a section of the Privacy Act requiring federal agencies, upon the request of an individual, to furnish such information "pertaining" to that individual as is contained in the agency's "system of records." 5 U.S.C. § 5529a)(d)(1). If not satisfied with the agency's response, the requester may bring a civil action against the agency for injunctive relief and damages. *See* 5 U.S.C. § 552a(g)(1)(B), (3)(A) & (4).

The judgments dismissing the complaints for lack of jurisdiction rested on a provision of the Internal Revenue Code - 26 U.S.C. § 7852(e) - which stats as follows:

> The provisions of subsections (d)(2), (3) and (4), and (g) of section 552a of title 5, United States Code, shall not be applied, directly or indirectly, to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which the provisions of this title apply.

Both of the two district court opinions in these cases took § 7852(e) to mean that the "provision of the Privacy Act providing the federal district courts with jurisdiction over civil actions to enforce the Privacy Act 'shall not be applied' to the IRS." *Maxwell v. Rubin*, 3 F. Supp. 2d 45, 48 (D.D.C. 1998). In other words, although subsection (d)(1) of the Privacy Act may require the IRS to furnish copies of records to an individual, § 7852(e)'s withdrawal of the subsection (g) jurisdictional grant leaves the federal courts with no power or authority to force the IRS to comply.

One of the district court's opinions relied on England v. Commissioner, 798 F.2d 350 (9th Cir. 1986), a case differing from those before us in one important respect. The taxpayers' Privacy Act suit in England sought, not a disclosure of IRS records under subsection (d)(1), but an amendment of them pursuant to subsections (d)(2) and (d)(3). These provisions permit an individual to request

amendment of a record pertaining to him" and require the agency either to make the correction or explain why it will not. 5 U.S.C. § 552a(d)(2), (3). As with a request for disclosure, subsection (g) gives the individual a right to sue in district court for an injunction and damages if the agency refuses to amend the records. See 5 U.S.C. § 552a(g)(1)(A). The *England* court put its decision in terms of lack of "jurisdiction." But it is also clear that England had no cause of action. Section 7852(e) explicitly deprives taxpayers of any right under the Privacy Act amendment provisions - subsections (d)(2), (d0(3) and (d)(4) - to force the IRS to respond to requests for the correction of tax records relating to the determination of their tax liability. In contrast, § 7852(e) does not mention the Privacy Act's disclosure provision (subsection (d)(1). This leads to a textual argument in favor of the plaintiffs: § 7852(E) reference to subsection (g), they contend, must be limited to suits dealing with the amendment of tax records because only the Privacy Act's amendment provisions are expressly made inapplicable to tax records.

There is a related point in plaintiffs' favor. To the extent that subsection (g) of the Privacy Act allows individuals to sue agencies for damages, it represents a waiver of the government's sovereign immunity. *See McMillen v. United States Dep't of Treasury*, 960 F.2d 187, 188 (1st Cir. 1991) (per curiam). Without subsection (g), plaintiffs seeking disclosure of tax records could never recover damages for Privacy Act violations. But general federal question jurisdiction under 28 U.S.C. § 1331 would allow an injunction action against a government official for violating the Privacy Act even if Congress had never enacted subsection (g). Congress years ago abolished the minimum amount-in-controversy requirement and waived sovereign immunity in all cases seeking relief "other than money damage." 5 U.S.C. § 702; see Bowen v. Massachusetts, 487 U.S. 879, 897 (1988); *Hubbard v. Administrator, Envtl. Protection Agency*, 982 F.2d 531, 533 (D.C. Cir. 1992) (en banc). On this view of the interplay of the statutes, if § 7852(e) rendered subsection (g) inapplicable to Privacy Act disclosure suits regarding tax determinations, plaintiffs could not recover damages. But under 28

U.S.C. § 1331,[1] the district court still had jurisdiction over their claims for injunctive relief resulting from the IRS's alleged failure to disclose the records in violation of subsection (d)(1).

There are two problems with the analysis in the last paragraph. The first is that it embodies an argument the plaintiffs never made. The second is that it ignores another provision, revised in the same legislation containing § 7852(e), a provision meant to deal very precisely and comprehensively with the IRS's disclosure of tax return information. In the Tax Reform Act of 1976, passed in the wake of Watergate and White House efforts to harass those on its "enemies list," *see Tax Analysts v. IRS*, 117 F.3d 7\607, 611 (D.C. Cir. 1997), Congress amended § 6103 of the Internal Revenue Code to protect the privacy of tax return information and to regulate in minute detail the disclosure of this material.[2] *See Church of Scientology v. IRS*, 484 U.S. 9, 16 (1987); *Tax Analysts*, 117 F.3d at 611, 615. As amended, § 6103(e)(7). The Seventh Circuit has decided that § 6103, although not framed as an exception to the Privacy Act, overrides any inconsistent provisions of prior statutes, including the Privacy Act, and represents the exclusive statutory route for taxpayers to gain access to their return information. See Cheek v. IRS, 703 F.2d 271, 271-72 (7th Cir. 1983). The Senate report accompanying the 1976 revision of §

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[1] The Lakes' complaint invoked jurisdiction not only under sub-section (g) of the Privacy Act, but also under 28 U.S.C. § 1331; and it named the Secretary of the Treasury, in his official capacity, as a defendant.

[2] *See*, e.g., 26 U.S.C. § 6103(a) (stating that "[r]eturns and return information shall be confidential" and not subject to disclosure "except as authorized by this title"); § 6103(c) (permitting, subject to requirements and conditions prescribed by the Secretary of Treasury, disclosure of taxpayer's return and return information to taxpayer's designee); § 6103(e) (requiring the IRS to disclose an individual's return to the individual "upon written request").

6103 supports this view.[3] Other considerations do as well. The condition on disclosure of return information in § 6103(e)(7) - "would not seriously impair Federal tax administration" - has no counterpart in the Privacy Act. This strongly suggests that Congress intended § 6103 to be the exclusive means by which individuals may obtain tax records relating to them. A comparison of the precise treatment of return information in § 6103 and the imprecise regulation of agency records in the Privacy Act reveals many other differences. In analogous circumstances, we have held that the Freedom of Information Act does not govern the disclosure of information when, in another statute, Congress has dealt with disclosure of the same information through "comprehensive, carefully tailored and detailed" provisions "designed to protect both the interest of" those seeking the information and the interest in "confidentiality." *Ricchio v. Kline*, 773 F.2d 1389, 1395 (D.C. Cir. 1985); *see* also *Essential Info., Inc., v. United States Info. Agency*, 134 F.3d 1165, 1169 (D.C. Cir. 1998) (Henderson, J. concurring). On the same basis, we believe that the

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[3] Recent Congressional action with respect to privacy in general has had an impact on the disclosure of tax information [citing the Privacy Act]. However, the Congress did not specifically focus on the unique aspects of tax returns in the Privacy Act. The committee has reviewed each of the areas in which returns and return information are now subject to disclosure. Although present law describes income tax returns as "public records," open to inspection under regulations approved by the President, or under Presidential order, the committee felt that returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103 where the committee decided that disclosure was warranted.

S. REP. No. 94-938, at 318 (1976), reprinted in 1976 U.S.C.C.A.N. 2897, 3747 (paragraph breaks and footnote omitted).

specified provisions of § 6103 rather the general provisions of the Privacy Act govern the disclosure of the sort of tax information requested here. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445, (1987); *Colorado Nurses Ass'n v. Federal Labor Relations Auth.*, 851 F.2d 1486, 1492 9D.C. Cir 1988); *see* also 2A *Sutherland Statutory Construction* § 51.05 (Norman J. Singer ed., 4th ed. 1984).

The plaintiffs in these cases were fully aware of their rights under § 6103. They "elected" not to follow § 6103, fearing an IRS decision that compliance with their requests would seriously undermine administration of the tax laws. Appellant's Reply Brief at 16. Whether the IRS would be warranted in coming to that conclusion 8is not for us to say at this point. Our decision, like that of the Seventh Circuit in *Cheek*, is that individuals seeking "return information" (26 U.S.C. § 6103(b), must do so pursuant to § 6103 of the Internal Revenue Code, rather than the Privacy Act. We therefore affirm the judgments of the district court, although not on the jurisdictional rationale contained in its opinions.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS HAROLD LAKE and ROSE C.LAKE,	*	
Plaintiffs,	*	C.A. No. 97-2767(WBB)
vii.	*	FILED
	*	Dec 11 1997
ROBERT RUBIN, in his official capacity as Secretary of the Treasury,	*	NANCY MAYER-WHITTINGTON, CLERK U.S. DISTRICT COURT
Defendant.	*	

MEMORANDUM

Plaintiffs bring this action under the Privacy Act of 1974, 5 U.S.C. §552a, to enjoin Defendant from withholding their individual records. However, the Privacy Act of 1974 "shall not be applied, directly or indirectly, to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which provisions of .... Title [26] apply." 26 U.S.C. §7852(e). Therefore, this court does not have jurisdiction over this action. Jaques et al. V. Internal Revenue Service, et al, 972 F.2d 1339, 1992 WL 185449, 2 (9th Cir. 1992); Ehramantraut v. Commissioner of the Internal Revenue Service, et al., 762 F.2d 1007, 1985 WL 13010, 1

(6th Cir. 1985). For this reason, the Court will deny Plaintiffs application for a preliminary injunction and dismiss the action in an order accompanying this Memorandum.

William B. Bryant
Senior United States District Judge

December 10, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWRENCE STEPHEN MAXWELL, Plaintiff, v. ROBERT RUBIN, Secretary of the Treasury, Defendant.	*	FILED APR 23 1998 Clerk, U.S. District Court District of Columbia Civil Action No. 97-2768(PLF)
WILLIAM THAD DAVID, Plaintiff, xii. ROBERT RUBIN, Secretary of the Treasury, Defendant.	*	Civil Action No. 97-2769(PLF)
ROGER C. WYDNER, Plaintiff, v. ROBERT RUBIN, Secretary of the Treasury, Defendant.	*	Civil Action No. 97-2770(PLF)

MEMORANDUM OPINION

On November 20, 1997, four separate complaints and motions for preliminary injunctions were filed in this Court. The facts and complaints in the four cases are essentially identical except that each has a different named plaintiff or plaintiffs.[1] On December 11, 1997, Judge William Bryant dismissed Lake v. Rubin, Civil Action No. 97-2767, for lack of subject matter jurisdiction. On December 24, 1997, this Court issued an order consolidating the three remaining cases, setting a briefing schedule on the issue of permanent injunctive relief and setting a date for a motions hearing. The consolidated cases are before the Court on the government's motion to dismiss. After careful consideration of the extensive briefs and memoranda filed by both sides and the arguments presented by counsel at the hearing, the Court concludes that it does not have subject matter jurisdiction over these cases, and the cases therefore shall be dismissed.

I. FACTS

Plaintiff Lawrence Maxwell brought this case under the

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[1] Since then, thirty-seven additional cases have been filed with nearly identical facts and complaints. All but the most recent of those cases have been stayed pending resolution of these-three consolidated cases.

Privacy Act, 5 U.S.C. § 552a.[2] He alleges that he has "been the recipient of threatening correspondence and numerous documents purportedly created and forwarded via United States mail by agents of the United States Department of the Treasury – Internal Revenue Service." Complaint at ¶.12. On August 12, 1997, Mr. Maxwell sent a letter to the Internal Revenue Service requesting:

> 1) any and all records containing information about Lawrence Stephen Maxwell relevant and necessary to accomplish a purpose of the Department of Treasury required to be accomplished by statute or by executive order of the President . . .
>
> 2) any and all records containing information about Lawrence Stephen Maxwell that determined that Lawrence Stephen Maxwell was subject to the enforcement authority of the Department of the Treasury . . .
>
> 3) any and all records containing information about Lawrence Stephen Maxwell that determined that Lawrence Stephen Maxwell was required by statute or executive order to pay, or cause to be paid, a "tax" to the Department of the Treasury . . .
>
> 4) any and all records containing information about Lawrence Stephen Maxwell that determined that Lawrence Stephen Maxwell was required by statute or executive order to file a "form" that has been

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[2] While each of the three plaintiffs in these consolidated cases has filed a separate complaint, the three complaints are virtually identical. For the sake of clarity, Mr. Maxwell's complaint is used as representative . Any material differences in the facts of the three cases are noted.

> promulgated by the Office of Management and Budget (OMB) pursuant to the SF-83 request filed with the OMB by the Department of the Treasury . . .

Complaint, Exh. 1 at 2.[3]

Mr. Maxwell alleges that he was trying to "obtain records that would explain adverse determinations made by the Department of the Treasury - IRS with regard to Plaintiff." Complaint at ¶. 5. In his letter to the IRS, Mr. Maxwell claimed that he was entitled to the records "under the provisions of the Privacy Act of 1974 codified at 5 U.S.C. 552a." Complaint at ¶. 12. Mr Maxwell alleges that he received no response from the IRS, so he sent a follow-up letter on October 2, 1997. Complaint, Exh. 3. By letter stamped November 18, 1997, the IRS informed Mr. Maxwell that his request for records was being denied because he had not followed the published procedure for making a request under the Privacy Act. Defendant's Opposition to Motion for Preliminary Injunction, Exh. 1.[4] On November 20, 1997, Mr. Maxwell, Mr. Davis and Mr. Wydner filed these suits to obtain the requested records.

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[3] Mr. Davis and Mr. Wydner sent their letters on August 18, 1997, but they requested exactly the same documents.

[4] The IRS sent a letter to Mr. Davis dated November 13, 1997. It is not clear whether a letter was ever sent to Mr. Wydner.

After the Court consolidated the three cases and set a briefing schedule on the issue of permanent injunctive relief, the government responded with a motion to dismiss on a variety of jurisdictional grounds. At the February 5, 1998 hearing, the Court asked the parties to address whether the relevant provision of the Internal Revenue Code, 26 U.S.C. § 7852(e) deprived the Court of jurisdiction over these cases.[5] Plaintiffs took the position that Section 7852(e) did not apply to this case. Counsel for the government represented that the government was not relying on Section 7852(e) as grounds to dismiss the cases for lack of jurisdiction. After the hearing, the Court informed the parties that it had an independent obligation to consider whether it had subject matter jurisdiction regardless of whether the parties wished to argue the matter and that "the plain language of Sec7852(e) appears to prevent this Court from exercising jurisdiction in this case." Memorandum and Order of February 6, 1998 at 2. The Court therefore directed the parties to file supplemental memoranda

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[5] 26 U.S.C. § 7852(e) provides:
The provisions of subsection (d)(2), (3), and (4), and (g) of Section 552a of title 5, United States Code, shall not be applied, directly or indirectly, to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which the provisions of this title apply.

"addressing the applicability of Section 7852(e) to this case." Id. at 3. The government now argues that Section 7852(e) applies to these cases and prevents the Court from exercising jurisdiction, while plaintiffs maintain, among other things, that Section 7852(e) is invalid.

II. DISCUSSION

Plaintiff has stated that his suit "is COMPLETELY pursuant and ONLY under the authority of the Privacy Act." Plaintiff's Reply to Defendant's Opposition to the Preliminary Injunction at 10. Because the Court concludes that the Privacy Act does not provide jurisdiction in this Court over these cases, this Court must dismiss the cases for lack of subject matter jurisdiction.

A. Statutory and Regulatory Framework

The Privacy Act, 5 U.S.C. § 552a, provides the framework by which the federal government maintains and disseminates information about individuals. Under the Privacy Act, each agency that maintains a system of records must provide an individual with "access to his record or to any information pertaining to him which is contained in the system." 5 U.S.C. § 552a(d)(1). An individual also has the right to request amendment of a record that he or she believes is incorrect, and the statute specifies certain procedural protections that an agency

must observe before denying an individual's request to amend his or her record. 5 U.S.C. § 552a(d)(2), (3) and (4). The Privacy Act also requires agencies to promulgate regulations establishing the procedures by which individuals can gain access to and seek to amend the records kept by the agency. 5 U.S.C. § 552(a)(f). Finally, the Privacy Act provides civil remedies for violations of the Privacy Act and provides for federal jurisdiction over such suits. 5 U.S.C. § 552a(g). Depending on the violation, a prevailing plaintiff in a Privacy Act suit may obtain injunctive relief, attorneys' fees and, if the government intentionally or willfully violates certain provisions of the Privacy Act, damages. Id.

Congress has provided by separate statute that the Internal Revenue Service is exempt from certain provisions of the Privacy Act. Specifically, it has provided that "subsections (d)(2), (3), and (4), and (g) [of the Privacy Act] . . . shall not be applied, directly or indirectly, to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which the provisions of this title apply." 26 U.S.C. § 7852(e). Certain provisions of the Privacy Act still apply to the IRS. For instance, while the IRS is exempt from the amendment provisions of the

Privacy Act, 5 U.S.C. § 552(a)(d)(2), (3) and (4), it is not exempt from the access provision, 5 U.S.C. §552(a)(d)(1), or from the requirement that the IRS promulgate regulations governing both access to and amendment of individuals' records. 5 U.S.C. § 552a(f).[6] The IRS, however, has been exempted from 5 U.S.C. § 552a(g), the section of the Privacy Act that provides a civil remedy for any violations of the Privacy Act and vests the federal courts with jurisdiction over such suits. See, 26 U.S.C. § 7852(e). The federal courts therefore lack jurisdiction over suits to enforce the Privacy Act against the Internal Revenue Service in cases in which the plaintiff seeks to obtain records which relate "directly or indirectly, to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense." 26 U.S.C. § 7852(e). The federal courts therefore lack jurisdiction over suits to enforce the Privacy Act against the Internal Revenue Service in cases in which the plaintiff seeks to obtain records which relate "directly or indirectly", to the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest,

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[6] The IRS has promulgated regulations pursuant to 5 U.S.C. § 552A(F). See 31 C.F.R. Pt. 1, Subpt. C, App. B.

fine, forfeiture, or other imposition or offense." 26 U.S.C. § 7852(e); see O'Connor v. United States, 669 F.Supp. 317, 323 (D.Nev. 1987), *aff'd*, 935 F.2d 275 (9th Cir. 1991).

B. Application of Section 7852(e)

Plaintiffs are attempting to "obtain records that would explain adverse determinations" made by the IRS. See Complaint at ¶5; Complaint, Exh. 1 at 2. These cases therefore concern "the determination of the existence or possible existence of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense." See 26 U.S.C. § 7852(e). As a result, plaintiffs cannot bring suit under the Privacy Act to gain access to these records.

Plaintiffs argue that Section 7852(e) does not apply because they are seeking records concerning the source of the IRS's authority to tax them rather than determinations of the amount of their tax liability. Plaintiff's Supplemental Memorandum at 4. The language of Section 7852(e), however, is written broadly to cover any "determination of the existence or possible existence" of an individual's tax liability; the source of the IRS's authority to tax a particular individual is part of the determination of that individual's liability and therefore falls within the proscriptions of Section

7852(e). See England v. Commissioner of Internal Reveneu, 798 F.2d 350, 352 (9th Cir. 1986) (records generated by the IRS in the course of processing tax returns and determining tax liability subject to Section 7852(e) prohibition); O'Connor v. United States, 669 F.Supp. At 323 (Section 7852(e) applies to documents idntifying taxpayer as "tax protester").

The plain language of Section 7852(e) states that the provision of the Privacy Act providing the federal district courts with jurisdiction over civil actions to enforce the Privacy Act "shall not be applied" to the IRS. While the Court should not rely solely on the plaint language of the statute if to do so would produce absurd results and undermine the intent of the statute, see, eg., Mova Pharmaceutical Corp. v. Shalaia, 1998 WL 168710 *7 (D.C. Cir. April 14, 1998), plaintiffs have offered no evidence that Congress did not intend what the plain language of Section 7852(e) dictates: to protect the IRS from civil liability in cases such as these brought pursuant to the Privacy Act. Plaintiffs assert that the absence of discussion about Section 7852(e) in the legislative history of the Tax Reform Act of 1976 indicates that "Congress had no knowledge whatsoever of its existence" and that the Court therefore should not give effect to the statute. Plaintiff's Supplemental Memorandum at 7. The absence of

legislative history, however, is simply not sufficient grounds for this Court to disregard clear statutory language or to assume that Congress did not know what it was doing. Confronted by a facially clear statute and the absence of legislative history clearly indicating a contrary intent on the part of Congress, the Court is bound by the plain language of the statute. See Mova Pharmaceutical Corp. v. Shalala, 1998 WL 168710 at *7.

Plaintiffs also argue that Section 7852(e) is invalid because the IRS has not promulgated in implementing regulation and suggest that a statute has no force or effect unless and until an agency promulgates regulations to enforce it. See Plaintiffs Supplemental Memorandum at 5-6. Plaintiffs misunderstand the law. The cases cited by plaintiffs address the limited situation, not raised here, where regulations are specifically "called for by the statute itself." See United States v. Mersky, 361 U.S. 431, 438 (1960). While the Privacy Act is such a statute, see 5 U.S.C. § 552a(f), Section 7852(e) of the Internal Revenue Code does not call for regulations. The lack of regulations therefore cannot invalidate the statute. Indeed, Section 7852(e) merely specifies that the IRS is exempt from certain provisions of the Privacy Act; it is difficult to imagine how the IRS could promulgate regulations to implement this provision.

Finally, plaintiffs argue that Section 7852(e) is unconstitutionally vague and therefore invalid. Again, plaintiffs apparently misunderstand either the law, the nature of Section 7852(e) or the void-=for-vagueness doctrine. The doctrine of vagueness prevents the government from imposing criminal and, to a lesser extent, civil penalties if the statute or regulation specifying the prohibited conduct is not sufficiently specific to provide fair notice and fair enforcement. See Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); Anthony G. Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). Section 7852(e) is not an enforcement statute; it does not prohibit any type of conduct and does not provide for any civil or criminal penalties. The Court will not invalidate Section 7852(e) on the grounds that it is unconstitutionally vague.

The Court concludes that 26 U.S.C. § 7852(e) is a valid statute that, by its plain language, prevents this Court from exercising jurisdiction over these cases. The defendant's motion to dismiss therefore will be granted. An Order and Judgment consistent with this Memorandum Opinion shall be issued this same day.

SO ORDERED.

_____

PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

DATE: 4/22/98

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS HAROLD LAKE AND ROSE C. LAKE, Plaintiffs/Appellants	*	No.98-5009, et al.
vs.	*	
ROBERT E. RUBIN, SECRETARY OF THE UNITED STATES, Defendant/Appellee	*	

Consolidated with Nos.
98-5184 THROUGH 98-5223 AND NOS. 98-5266 THROUGH 98-5316.

On Appeal from the United States District Court
for the District of Columbia.
District Court Nos. 97-2767, 97-2768 and applied
to dismissal of 39 other related cases that had been
consolidated.

BRIEF OF THE APELLANTS

J. Hamilton McMenamy
Fred A. Ohlinger
P. O. Box 7649
Pasadena, Texas 77508
(713)472-2286
(713)475-0521 Fax
Attorneys for Appellants

ARGUMENT

I.
Standard of Review

"Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the Court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). A statute may be invalidated on its face, however, only if the overbreadth be substantial arose from our recognition that application of the overbreadth doctrine is, "manifestly strong medicine," Broadrick v. Oklahoma, *supra* at 613, and that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984)." *See* Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

The holdings of the lower tribunals produce such an absurd

result that they inevitably cause a deprivation of the First Amendment right to receive information, the First Amendment right to petition the government for a redress of grievance, and effectively prohibit the Appellants and any other American Citizen from having any means or method of determining the existence or possible existence of a tax liability or the amount thereof. The Court should not rely solely on the language of the statute if to do so would produce absurd results and undermine the intent of the statute. See, e g., Mova Pharmaceutical Cor0p. V. Shalaia, 1998 WL 168710 *7 (D.C. Cir. April 14, 1998). The Court should find that the trial courts erred in finding the IRS is EXEMPT from the mandates of the Privacy Act and the implementing regulations, and further erred for failing to find that Internal Revenue Code Section 7852(e) is VOID for VAGUENESS and VOID for OVERBREADTH.

II.

The "Right to Receive" Doctrine

The Constitution of the United States of America is the supreme law of the land that guarantees, protects and preserves under the First Amendment the undeniable right of the Citizens of the sovereign Union States to exercise free speech against the government. The "right to receive" doctrine has been set forth by the Supreme Court of

the United States as an equal and necessary right parallel to the right of free speech acknowledging that Citizens MUST be given access to information so that they may intelligently argue and exercise their First Amendment rights to speak freely. See Board of Island Trees v. Pico, 457 U.S. 853, 866-867 (1982). Discovery in civil litigation, disclosure in criminal litigation and discovery in seeking administrative remedy flows from this most basic right to "receive information" to use in the exercise of petitioning the government for a redress of a grievance, most especially to protect one's life, liberty or property from unlawful acts caused by the government.

Justice Brennan, writing for the majority in Board of Island Trees v. Pico, made it very clear that free speech is a two-way street - the right to receive information as well as the right to disseminate information:

> Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expressions but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). In keeping with the principle, we have held that in a variety of contexts "the constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); see *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972) (citing

> cases). This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the Sender's First Amendment right to send them: "The right of freedom of speech and freedom of the press. . . embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (citation omitted). "The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965a) (Brennan, J. concurring).

More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."

See Board of Island Trees v. Pico, 457 U.S. 853, 866-867 (1982).

The right to receive information to be able to speak intelligently and freely for the public good, PALES in comparison to the right to receive information to protect one's life, liberty and property from the unlawful intrusion of the federal government.

In 1974, Congress enacted the Privacy At as a PROTECTION of the Citizens by setting forth clear and precise mandates that government agencies MUST maintain "complete, accurate and timely records" with regard to any individual who knowingly subjected themselves to the authority of a federal agency. The Appellee, being the Secretary of the Treasury of the United States, knowing that the

congressional mandates of the Privacy Act applied to the IRS, complied with the Privacy Act requirements at 5 USC 552a(f) and promulgated regulations setting the policies and procedures that require the IRS to maintain records and to provide access to the confidential tax records of the individuals who requested their records. The Appellee delegated authority to create a National Privacy Act Disclosure Office that for the last 24 years has processed requests sent to the disclosure office by producing confidential tax records to individuals who requested their records under the Privacy Act. See 5 USC 552a attached hereto as Addendum 1.

The Director of the National Disclosure Office, along with all other IRS employees, regularly supply access to records pursuant to IRS regulations promulgated by the Appellee and found in the Federal Register at 31 CFR Part 1 Subsection (c) Appendix B2, that state, to wit:

> Individuals are advised that Internal Revenue Service procedures permit examination of tax records during the course of an investigation, audit, or collection activity. Accordingly, individuals should contact the Internal Revenue Service employee conducting an audit or effecting the collection of tax liabilities to gain access to such records, rather than seeking access under the provisions of the Privacy Act. Where, on the other hand, an individual desires information or records not in connection with an investigation or audit or collection activity, the

> individual may follow these [Privacy Act] procedures. [emphasis added].

See 31 CFR Part 1 Subsection (c) Appendix B2 attached hereto as Addendum 2.

The Privacy Act regulations promulgated by the Appellee that are found at 31 C.F.R. 1.26(d)(iv), state that the [Privacy Act] requester is required only to "Describe the nature of the record(s) sought in sufficient detail to enable Department personnel to locate the system of records containing the record w3ith a reasonable amount of effort." The title of the IRS Privacy Act regulations found at 31 CFR 1.26 is "Procedures for notification and access to records pertaining to individuals - format and fees for request for access." Clearly and obviously, the Appellee has complied with the requirement of 5 U.S.C. 552a(f) to promulgate the regulations requiring the IRS to comply with the access requirement of the Privacy Act. See 31 C.F.R. 1.26 attached hereto as Addendum 3.

Regulations, that are "inextricably intertwined with the statute," have the force and effect of law and are binding on the agency. "Once promulgated, these regulations, called for by the statute itself, have the force of law . . . just as if the details had been incorporated into the congressional language." United States v.

Mersky,361 US 431, 438 (1960). It is not optional for the IRS to decide whether they do are do not want to provide access to records. The Privacy Act regulations binding on the IRS require that they provide access to records. Failure to provide access is a violation of federal law. The Friedman trial court held that the IRS was subject to the Privacy Act requirement to promulgate regulations, but also stated that, once promulgated, the IRS was not required to abide by them, and/or, if they fail to abide by the regulations, or to provide access to records, there was no means of judicial review to force compliance. See Order of Judge Paul Friedman, A15. The grim reality of the Friedman court's holding is that it has placed the IRS above the law and has effectively sanctioned the IRS" policy and practice to deprive Appellants and the American Citizenry of their right to receive information to protect themselves from government tyranny and IRS abuses.

Further, the Appellee has promulgated additional regulations published at 26 CFR 601 that state:

> 26 CFR 601.501 Scope of rules; definitions.
> (15) Tax information authorization. A document signed by the taxpayer authorizing any individual or entity (e.g., corporation, partnership, trust or organization) designated by the taxpayer to receive and/or inspect confidential tax information in a specified matter. (See section 6103 of the Internal

> Revenue Code and the regulations thereunder.)
> . . .
>
> 26 CFR 601.504(b)(1)
> (b) Situations in which a power of attorney is not required. (1) Disclosure of confidential tax information. The submission of a tax information authorization to request a disclosure of confidential information does not constitute practice before the Internal Revenue Service. (Such procedure is governed by the provisions of section 6103 of the Internal Revenue Code and the regulations thereunder.) Nevertheless, if a power of attorney is properly filed, the recognized representative also is authorized to receive and/or inspect confidential tax information concerning the matter(s) specified.

See 26 CFR 601.501-504 attached hereto as Addendum 4.

The general scope of the 26 CFR 601.501 - 508 regulations is an intricate explanation and procedural implementation of individuals retaining licensed professionals to assist them with regard to IRS matters and to obtain confidential tax records by filing a Power of Attorney or by filing a Tax Information Authorization. Internal Revenue Code Section 6103 requires that the IRS produce "tax return information" upon request to individuals or their appointed representatives. See copy of IRC § 6103 attached hereto as Addendum 5. It is beyond question that the Appellee, with full knowledge that the IRS is bound by the mandates of the Privacy Act and IRC § 6103, promulgated procedural and administrative

regulations for setting forth the lawful procedures by which individuals can exercise their rights to access individual records maintained by the IRS, and by which the IRS must produce the confidential tax records when they are requested by the individual.

The first and most fundamental records maintained by a federal agency would be records that show how the subject individual was determined to be under the authority of the agency. For the IRS, this necessarily would be a record that establishes that the individual was a "taxpayer" as that term in defined in the Internal Revenue Code and would additionally show what "particular tax" a subject individual would owe and "what form" the subject individual would be required to file to report the income derived from the source within the United States that was determined to be a source from which the individual has "taxable income." The taxable income "sources" are listed in the regulations promulgated by the Appellee and published in the Federal Register at 26 CFR 1.861-8(f)(1).

IRS regulations at 26 CFR 1.861-8 set forth requirements of the IRS to determine "taxable income" as follows:

> §1.861-8 Computation of taxable income from sources within the United States and from other sources and activities.
> (a) In general - (1) Scope, Sections 861(b) and 863(a) state in general terms how to determine

> taxable income of a taxpayer from sources within the United States AFTER gross income from sources within the United States has been determined.... The rules contained in this section apply in determining taxable income of the taxpayer from specific sources and activities under other sections of the Code, referred to in this section as operative sections. See paragraph (f)(1) of this section for a list and description of the operative sections.
>
> (4) Statutory grouping of gross income and residual grouping of gross income. For purposes of this section, the term "Statutory grouping of gross income" or "Statutory grouping" means the gross income from a specific source or activity which must FIRST be determined in order to arrive at "taxable income" from which specific source or activity under an operative section. (See paragraph (f)(1) of this section.)

Appellants have the right and the responsibility to themselves and their posterity to determine if they are subject to the authority of the Department of the Treasury and to determine if they owe a particular tax to the United States government. The law requires that the IRS "first determine the specific source or activity under an operative section [of the Internal Revenue Code] in order to arrive at "taxable income" . . ." See 26 CFR 1.861-8(4). It is this "determination document" that would show the "source" of taxable income that would be one of the "complete, accurate, timely and relevant" records that the Privacy Act requires to be maintained that would provide proper notification of any obligation or liability that an

Appellant may have as a result of an IRS "determination." Obviously, if the determination has never been made and no record shows that any such determination exists, then no obligation or liability can exist.

The Appellants can not possibly know whether they have an obligation to the United States government unless there is provided to them some lawful document or record that sets forth the basis for such a determination. It is IMPERATIVE that such records be maintained and supplied upon request for the Appellants to receive FAIR NOTICE that any lawful obligation exists and that failure to meet the obligation could result in harm or damage to them or their property.

The Appellants, being lawful, intelligent, responsible Americans who are seeking to resolve disputes that have horribly disrupted their lives and have subjected many of them to unfold abuses by the IRS, have retained counsel, and at considerable expense, have caused suit to be filed in the District of Columbia to seek an injunction enjoining the withholding of the records that the IRS is required to maintain. The Privacy Act states and the regulations require that the IRS produce the records. The National Disclosure Office exists to process Privacy Act requests and produce records. For the first five months of the district court litigation the

Appellee's arguments fully acknowledged that the IRS is required to produce the records with the Appellee ultimately resting his only real objection to producing the records on the meritless claim that the Appellants must specify which system - of the 124 IRS Systems of Records - contained the records that were being sought. See Memorandum of Points and Authorities in Support of Motion of Defendant Robert Rubin to Dismiss the Action, A31-A32.

It was the trial courts[7], NOT the Appellee who raised the issue that Internal Revenue Code Section 7852(e)(hereinafter "IRC § 7852(e)" was a jurisdictional bar to the district court granting the relief sought by the Appellants. See copy of IRC § 7852(e) attached hereto as Addendum 6. Following considerable prompting by the Friedman trial court, and after

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[7] The two district courts that adjudicated these suits both raised the issue of §7852(e) without any reference to §7852(e) by the Appellee. Judge William Bryant dismissed the Thomas Harold Lake case citing §7852(e) as the basis for dismissal. This reference to §7852(e) in Judge Bryant's one paragraph order is the only reference to §7852(e) in the entirety of the record of that case. A2. Following the filing of Judge Bryant's order of dismissal, Judge Friedman, sua sponte, ordered the parties to file supplemental memoranda on the applicability of §7852(e). A hearing was held where the government argued that §7852(e) was not applicable to these cases because, the Appellee stated, these cases are "access" cases, not "amendment" cases. A81-A82. Subsequent to the February 5, 1998 hearing Judge Friedman again ordered additional supplemental briefs on the applicablity of §7852(e) to be filed, especially in light of the Appellee's argument to the Court that effectively placed both the Appellant and the Appellee in full agreement with the non-applicability of §7852(e).

a six week extension granted to the Appellee to file a response brief on the applicability of IRC §7852(e), the Appellee underwent a 180° about face and completely reversed the position they had argued with regard to IRC §7852(e) for the previous five months, a position held by the office of the Appellee for the 22 years of its existence. Appellee now argues that the broadest application of IRC § 7852(e) is a congressional mandate that the IRS can NOT be compelled to produce any record or document form which an individual could possibly determine, directly or indirectly, the existence or possible existence of a tax liability. This completely absurd position was echoed by the Friedman trial court in the decision as follows:

> Plaintiffs argue that Section 7852(e) does not apply because they are seeking records concerning the source of the IRS's authority to tax them rather than determinations of the amount of their tax liability. Plaintiffs Supplemental Memorandum at 4. The language of Section 7852(e), however, is written broadly to cover any "determination of the existence or possible existence" of an individual's tax liability; the source of the IRS's authority to tax a particular individual is part of the

> determination of the individual's tax liability and therefore falls within the proscriptions of Section 7852(e).

See Order of Judge Paul Friedman, A16.

The trial court's holding that § 7852(e) is written broadly for the express purpose of providing language preventing any Citizen from determining the source of the authority of the IRS to tax an individual is tantamount to the doctrine of *Lex Rex*, the "divine right of kings" - the king can do no wrong. This horrific memorialization by the trial court sanctioning the unconscionable abuses of the rights of the American people - common in the day to day policy and practice of the IRS with the apparent blessing of the trial court - is a direct parallel to the very practice of the King's Bench of the despotic monarchy of King George that led to the American Revolution, the very event that caused the founding of this nation and the drafting and ratification of the Constitution for the United States of America to guarantee the American People that they would never again be subjected to such oppressive and despotic forms of tyranny. The trial court's holding flies in the

face of all that is reasonable and equitable in a republican form government, and all of the protections of the Constitution for the United States of America that guarantee to the Citizens that the government cannot oppress them or deprive them of their property without due process of law. The trial court has, in essence, held that a Citizen has no right to even KNOW the source of the IRS's authority to tax him, much less if he has a tax liability. Viewed in another light, the court has held that the IRS is protected from providing any information whatsoever that might possibly allow the Appellants to learn of the existence or possible existence of a tax liability. In light of such an unintelligible holding, neither the Appellants, nor any American Citizen, can ever have any knowledge that they do or do not owe a tax to the United States government. Further, no Appellant could ever be held accountable for failure to dispose of any tax liability that the IRS has refused to disclose, and, because of the trial court's holding, no Appellant has any means or method by which to determine the existence or even the possible existence of a tax liability, much less the amount

of the liability. While the trial court's holding guarantees that the IRS can continue to abuse the American People with impunity, it also guarantees that no Appellant, or any other American Citizen can ever again be prosecuted for "willfully attempting to defeat or evade a tax" because the Appellants cannot possibly gain or have any knowledge that he owes or might owe a tax. The absurdity of this conclusion is clear on its face and the result is an unconscionable deprivation of the constitutionally guaranteed rights of the Appellants and the continued despotic abuses of the IRS against the Appellants and the Citizens of the United States of America.

III.

The Overbreadth Doctrine

The trial courts' holdings that §7852(e) effectively denies the Appellants access to information, denies the Appellants the exercise of free speech, denies the Appellants the right to petition the government to redress a grievance, and insures that the IRS can continue to deprive Appellants of property without due process. IRC § 7852(e) is, therefore,

repugnant to the Constitution and must be declared VOID FOR OVERBREADTH.

The Overbreadth Doctrine is defined in Blacks Law Dictionary, Sixth Abridged Edition as follows:

> This doctrine, which derives from First Amendment, serves to invalidate legislation so sweeping that, along with its allowable proscriptions, it also restricts constitutionally protected rights of free speech, prss or assembly. The doctrine requires that a statute be invalidated if it is fairly capable of being applied to punish people for constitutionally protected speech or conduct. A law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but ... sweeps within its ambit other activities that constitute an exercise" of protected expressive or associational rights. Thomhill v. Alabama, 310 U.S. 88, 97, 60 S.Ct. 296, 84 L.Ed. 460. A plausible challenge to a law as void for overbreadth can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach.

IRC §7852, as it is being applied by the IRS and the holding of the trial courts, clearly enjoins the constitutionally protected right to receive information. See *Stanley v. Georgia*, 394 U.S.

557, 564 (1969); see *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972). The encroachment caused by § 7852 (e) is even more heinous than that of the protected activity in Stanley and Kleindist because the INTENT of the IRS's application of §7852(e) is to conceal from the Appellants, many of whom are being harmed by the perceived illegal acts of the IRS, evidence that the IRS has failed to maintain "accurate, timely and complete" records necessary to provide a basis for the adverse determinations made against the Appellants. The absence of these records, and/or the false or fraudulent content of these records, would provide demonstrative evidence of such illegal acts committed by the IRS including unlawful collection acts that are nothing more than THEFT disguised as the exaction of a tax. Boiled to its essence, the application of §7852(e) is tantamount to "obstruction of justice." While Congress has passed numerous laws such as the "Taxpayer Bill of Rights" purporting to provide some protection fro taxpayers from the widely known and acknowledged abuses by IRS, these laws are, for all intents and purposes, rendered meaningless if the IRS is

not required to comply with "public protection" laws mandating that they produce records or admit the non-existence of records that might expose the lack of authority of the IRS to impose a tax on an specific individual or that the amount of the gax imposed is unsbustantiated and, therefore, unlawful.

IRS § 7852(e) does not aim specifically at evils within the allowable area of government control, but rather it sweeps wihtin its ambit other activities that constitute an exercise of protected constitutional rights. Thomhill v. Alabama, 310 U.S. 88, 97, 60 S.Ct. 296, 84 L.Ed. 460.

IRC § 7852 is void for overbreadth because (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach.

IV

Ambiguities of Internal Revenue Code Section 7852(e)

IRC § 7852(e) is so ambiguous and unclear that the Appellee literally entitled an entire section of his memorandum

to the trial court on the applicability of § 7852(e) to read, "The Ordinary Meaning of Section 7852(e) is Ambiguous and Unclear." See Defendant's Memorandum at Page 9, A47. Appellants and Appellee agree that there is no "plain language" in 7852(e). The code section is an afterthought couched in a section of the Internal Revenue Code titled "Other Applicable Rules" that contains sections on the "Separability Clause," "Reference in other laws to the internal revenue coce of 1939." "Items not to be twice included in income or deducted therefrom," and "Treaty Obligations." Even more strange is that the title of § 7852(e) is, "The Privacy Act of 1974". The Privacy Act of 1974 is codified at 5 USC 552a, not at IRC § 7852(e). The name of the section, on its face, supports the incredible ambiguity of § 7852(e). Even more interesting is that there is no authority reference to the Privacy Act of 1974 in IRC § 7852. The source and intent of §7852(e) still remain a mystery. The code section is a dichotomy of internal conflict. It begins with a pretentious reference to Privacy Act subsections applicable to amending records and then references

activities with regard to discovering the "existence or possible existence" of a tax liability. The first and second parts of the code sections are in direct conflict. The authors of §7852(e) never envisioned that an individual would be denied access to his records. If such was the case, there would have been no reason to include prohibitions for the use of 5 U.S.C. 552a Subsections (d)(2)(3) and (4) because no records would ever be in the hands of any individual that could be determined to be incorrect and/or in need of alteration or amendment. Thus, the ambiguity of § 7852(e) presented the trial courts with the option to "guess" at its meaning. "Rather than striking down §7852(e) due to its due process violations resulting from § 7852(e)'s want of plain language, the trial courts opted to "guess" at its meaning.

The text of IRC § 7852(e) is as follows:

> (e) Privacy Act of 1974. The provisions of subsections (d)(2), (3), and (4), and (g) of section 552a of title 5, United States Code, shall not be applied, directly or indirectly to the determination of the existence or possible existence of liability (or the amount thereof) of any person or any tax, penalty, interest, fine, forfeiture, or other imposition or offense which the provisions of

this title apply. [emphasis added].

See copy of IRC §7852(e) attached hereto as Addendum 6.

In their arguments to the Friedman trial court, the Appellants offered their explanations in an attempt to decipher § 7852(e). Appellants stated that in reviewing the language in § 7852(e) we find reference to "Subsections (d)(2), (3) and (4) of 5 U.S.C. 552a", the conjunction "AND", and then "(g)". The first subject of § 7852(e) - "SUBSECTIONS (D) (2), (3) AND (4)" - is separated by a conjunction from the second subject of §7852(e) - "g". The language following the conjunction can only be viewed in light of what prcedes the conjunction since its joinder is clearly based on what precedes the conjunction. The only stipulation preceding the conjunction is language regarding subsections of the Privacy Act dealing strictly with amending records. Viewed in this light, the joining of subsection (g) can oly apply to subsection (g)(1)(A), which states, to wit:

> (G)(1) Civil Remedies. - Whenever an agency
> (A) makes a determination under subsection (d) (3) of this section not to amend

> an individual's record in accordance to his request, or fails to make such a review in conformity with the subsection;
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

The specific reference in subsection (g)(1) to subsection (d)(3) and a review of the other sections of subsection (g) clearly demonstrate that the only applicable section of subsection (g) to subsections (d)(2), (3) and (4) is subsection (g) (1)(A). The reason that there is no specific reference in subsection (b) to subsections (d)(2) and (4) is probably because, for all intents and purposes, subsection (d)(3) is the only subsection that "permits the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal." It is from this denial by an agency to allow an individual a "review" of the refusal to amend that an individual would s3eek relief in a district court pursuant to (g)(1)(A). Appellants surmised that, in its ambiguity, § 7852(e) appears to bar a civil action where the relief sought is based on an individual's allegation that he has been denied rights under

subsections (d)(2), (3) and (4) of the Privacy Act and suit is authorized under subsection (g)(1)(A).

In the instant case, Appellants' complaints clearly state that relief is sought for violations of subsection (d)(1) of the Privacy Act. This subsection deals only with access to records. The statement of jurisdiction confers jurisdiction upon the Court pursuant to subsections (g)(1)(B) and (C). Appellants did NOT request the Court to take jurisdiction under subsection (g)(1)(A). The Appellee's counsel, in a hearing held on February 5, 1998, clearly stated that it was the position of the Appellee, being the Secretary of the Treasury whose duty it is to know the application of the Internal Revenue Code and to promulgate all regulatons for the implementation of the Internal Revneuen Code, that §7852(e) only deals with amendment cases and, therefore, does not apply to these cases because they are access cases, NOT amendment cases. It would seem amazing that if the Secretary of the Treasury thought he had even the least chance of protecting the IRS from being required to produce records by relying on § 7852(e), he would, by all

means, rely on it to the utmost. But the Secretary, being acutely familiar with the code and its proper application, has redundantly stated, "by and through counsel, that § 7852(e) is not applicable. See Transcript of February 5, 1998 hearing before Judge Paul L. Friedman attached as Exhibit A to Plaintiffs Reply to Defendant's Memorandum on the Applicability of 26 USC Section 7852(e), A81-82.

The Appellee acknowledged that the Appellants' assertion was definitely "one possible interpretation, but not the only interpretation or not the most appropriate interpretation." See Defendant's Memorandum on the Applicability of 26 U.S.C. Section 7852(e), A46 and A49. By and through this admission, the Appellee clearly established the existence of the elements necessary to determine that §7852(e) is "void for vagueness." " A law is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application." Smith v. Goguen, 415 U.S. 566 (1974). The Appellee argued to the trial court to demonstrate the ambiguity of §7852(e) as follows:

> The language of Section 7852(e) is somewhat ambiguous. Section 7852(e) provides that the Privacy Act of 1974, and its waiver of sovereign immunity, does not apply with respect to records involving the determination of tax liabilities. The first three sections of the Privacy Act enumerated in the Section 7852(e) are §§ 552a(d) (2), (3), and (4). These sections pertain to amendments of records. The logical conclusion is that suits against the United States involving requests for amendments to tax records are barred. See Defendant's memorandum at Page 7. "It seems, then that there are no civil remedies available in cases involving both access to and amendment of records . . ." See Defendant's Memorandum at Page 8. "N their supplemental memorandum, plaintiffs assert that the inclusion of subsection (g) of the Privacy Act was intended to apply to subsections 9d) (2), (3) and (4). This is one possible interpretation, but not the only one. If plaintiffs were correct, Congress presumably would have merely specified only subsection (g) (1) (A), which is the relief provision applicable to amendment of record instead of all of subsection (g), which is applicable to all civil remedies.

See Defendant's Memorandum on the Applicability of 26 U.S.C. § 7852(e), A46.

The Appellee's memorandum is replete with assertions to the trial Court that § 7852(e) is ambiguous and unclear:

> The language of Section 7852(e) is somewhat

> ambiguous. ... Any ambiguities related to waivers of sovereign immunity must be construed in favor of the sovereign. The statutory ambiguity in the instant case leads to the conclusion that there is no waiver of sovereign immunity. [bolded emphasis added]

See Defendant's Memorandum on the Applicability of 26 U.S.C. § 7852(e), A45-A46.

Appellee further admitted to the trial court that:

> In analyzing the ordinary meaning of Section 7852(e), it becomes apparent that there exists some ambiguity. However, Congress also added § 552a (g) to this list of subsections in Section 7852 (e). In including this subsection, an ambiguity was introduced. [boded emphasis added.]

See Defendant's Memorandum, A49.

"Statutory ambiguity" is the phrase coined by the Appellee to describe § 78452(e). See Defendants Memorandum, A46. This phrase has been used interchangeably by many of the federal courts with the term "vagueness." Statutory ambiguity and vagueness cause a statute to be VOID. "It is a basic principle 9of due process that an enactment is void for vagueness if its prohibitions are not

clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Amazingly, despite his testimonial to the ambiguity of § 7852(e), the Appellee concluded that the ambiguity of § 7852(e) was a shield provided to the IRS to protect them from being required to comply with the mandates of Congress as specified in the Privacy Act of 1974. The Appellee asserted, "Any ambiguities related to waivers of sovereign immunity must be construed in favor of the sovereign. The statutory ambiguity in the instant case leads to the conclusion that there is no waiver of sovereign immunity." See Defendants Memorandum, A46. Ambiguities cannot be construed in favor of any party. The very fact that the statute is ambiguous makes it a NULLITY because it deprives the parties of due process. The statute cannot be applied by the Court where to do so would cause the Court to necessarily GUESS at the meaning of the statute.

The Appellee correctly asserted that a waiver of immunity must be explicit and clear. A50. The Appellee further admits that the Privacy Act of 1974 grants a clear and

explicit waiver of immunity to sue the government for non-compliance with the Act. A50-51. Then the Appellee claimed that § 7852(e) grants an exception to the wavier of immunity, and, in the same breath, the Appellee redundantly described § 7852(e) as ambiguous and unclear. A51. Obviously, if a waiver of immunity must be explicit and clear, any exception to a waiver of immunity would be held to the same standard. The exception to a waiver of immunity must be equally explicit and clear. The Appellee argues against himself, without conviction, and his arguments are meritless. The Friedman trial court's decision to ignore the obvious ambiguities of § 7852(e) results in a deprivation of due process and an absurd result in the application of the statute. The Friedman trial court erred in failing to find that IRC § 7852(e) is hopelessly VOID for VAGUENESS.

V.

Legislative History - Congressional Intent

IRC § 7852(e) finds its genesis in the Tax Reform Act of 1976 reveals that Congress had no intention whatsoever to

amend the Internal Revenue Code in a manner that would shield the IRS from being required to comply with Privacy Act requirements to provide access to individuals records. In fact, the Tax Reform Act of 1976, in amending IRC § 6103 did just the opposite of what is claimed by the trail court - it clarified the procedures and methods by which the IRS must disclose confidential tax information to the subject individual.

The appellants demonstrated to the trail court that neither the House Bill, the Senate Amendments, the Legislative History, the Senate Committee Notes nor the Senate Committee Transcripts contain even one word with regard to *exempting* the IRS from the Privacy Act and/or anything even slightly related to the wording of IRC § 7852(e). There is no evidence whatsoever that Congress has the slightest clue the Tax Reform Act of 1976, as it was signed into law, contained the language that now exists as § 7852(e). In fact, the very first appearance in the legislative process of this code section is found in the Statute at Large, 90 Stat. 1688, Section 1202(g). Even in light of the complete absence of a legislative history the trail court

held as follows:

> While the Court should not rely solely on the plain language of the statute if to do so would produce absurd results and undermine the intent of the statute, see, e g., MovaPharmaceutical Corp. v. Shalaia, 1998 WL 168710 *7 (D.C. Cir. April 14,1998, plaintiffs have offered no evidence that Congress did not intend what the plain language of Section 7852(e) dictates: to protect the IRS from civil liability in cases brought pursuant to the Privacy Act. Plaintiffs assert that the absence of discussion about Section 7852(e) in the legislative history of the Tax Reform Act of 1976 indicates that "Congress had no knowledge whatsoever of its existence" and that the Court therefore should not give effect to the statute. Plaintiff's Supplemental Memorandum at 7. The absence of legislative history, however, is simply no sufficient grounds for this Court to disregard clear statutory language or to assume that Congress did not know what it was doing. Confronted with a facially clear statute and the absence of legislative history clearly indicating a contrary intent on the part of Congress, the Court is bound by the plain language of the statute. See Mova Pharmaceutical Corp. v. Shalaia, 1998WL 168710 at *7

See April 23, 1998 Order of Judge Paul Friedman, A17.

The trial court's errors in this passage are numerous. IRC § 7852(e), as shown hereinabove, does NOT contain facially clear language. The redundancy of the trail court to

apply six (6) "colorable" descriptions of § 7852(e) as "plain language," "clear statutory language" and a "facially clear statute," in the space of one paragraph, especially in light of the government's eleven (11) separate claims that § 7852(e) is "ambiguous and unclear," reveals a staunch attempt to ask the fatal defects of § 7852(e). But no matter how many times the trial court refers to § 7852(e) as a "facially clear statute," the inclusion of Subsection (g) in the statute that also contains cites about amending records when its majority language seems to suggest something about discovery of tax liability guarantees that confusion and varying interpretations of § 7852(e) is unavoidable.

It is unimaginable that someone could seek to amend or alter records if they have no knowledge of the existence of the records. The fact that § 7852(e) seems to suggest that records cannot be amended by using the Privacy Act would reveal that individuals certainly would have means or method of obtaining the records that might be determined to be incorrect. There could never be a concern that someone might use the Privacy

Act under 5 U.S.C. 552a Subsections (d) (2) (3) and (4) to attempt to amend records if the IRS never releases any records for review. Clearly, the authors of § 7852(e) never envisioned that an individual would be denied access to his records. If such was the case, there would have been no reason to include prohibitions for the use of5 U.S.C.552a Subsections (d) (2) (3) and (4) because no records would ever be in the hands of any individual that could be determined to be incorrect and/or in need of alteration or amendment.

The trial court makes constant reference to the term "plain language" of the statute. One must only read § 7852(e) to determine that it is anything but "plain." If the statute had contained "plain language" that EXEMPTED the IRS from the Privacy Act, the "plain language" would have read something like, "The IRS is EXEMPT from any civil liability or prosecution under Subsection (g) of the Privacy Act." This is what is known as "plain language." Obviously, no such language exists. There is not even a scintilla of evidence or any wording in § 7852(e) whatsoever that remotely suggests that

Congress intended to exempt the IRS from the access requirements of the Privacy Act or from civil liability under the Privacy Act for failure to produce records.

The standard of review is that because § 7852(e) is so "ambiguous and unclear" and the alleged application of the statute produces such "an absurd result," (See Mova Pharmaceutical Corp. v. Shalaia, 1998 WL 168710 at *7), the trial court should have looked at the obvious and compelling evidence that Congress did NOT intend the code section to be interpreted in such a manner. The FACT that neither the House Bill, the Senate Amendments, the Legislative History, the Senate Committee Notes nor the Senate Committee Transcripts contain even one word with regard to *exempting* the IRS from the Privacy Act and/or anything even slightly related to the wording of IRC § 7852(e) is the BEST EVIDENCE that could possibly exist that Congress never intended to enact a law to EXEMPT the IRS from the Privacy Act or from civil liability for violating the Privacy Act.

Again reviewing the Friedman trial's court logic, lets

examine the following:

> . . . plaintiffs have offered no evidence that Congress did not intend what the plain language of Section 7852(e) dictates: to protect the IRS from civil liability in cases brought pursuant to the Privacy Act. . . . The absence of legislative history, however, is simply not sufficient grounds for this Court to disregard clear statutory language or to assume that Congress did not know what it was doing

See April 23, 1998 Order of Judge Paul Friedman, A17

It is not possible to prove or show that which does not exist. Congress does not provide us with a legislative history of what it did NOT intend to do. Just imagine for a second what the result would be if Congress tried to tell us with the enaction of each law what it was NOT intending to accomplish. Obviously, the legislative history only shows us what Congress DID intend to accomplish. And the ABSENCE of any evidence whatsoever that Congress intended to enact § 7852(e) and the complete absence of any language with regard to § 7852(e) EXEMPTING the IRS from the Privacy Act, serves as very persuasive evidence that Congress did not intend to exempt the IRS from providing access to records under the Privacy Act or

from civil liability for failure to produce records.

Additional evidence that no such "plain language" exists that would EXEMPT the IRS from civil liability is exposed by the reading of The United States Attorney's Manual, Title 6, Tax Division, Section3.350(Oct.1985), states, to wit:

> 6-3.350 Suits Under the Privacy Act
> The Privacy Act of 1974, 5 U.S.C. § 552a, has great potential for creating further litigation against the Internal Revenue Service. Subsection (g))1) - (5) of the Privacy Act creates injunction and tort type actions against the agency involved. Specifically, an individual has the right to seek an injunction ordering the production of any agency record allegedly improperly withheld from the individual, and, in addition, may seek an injunction ordering the agency to amend an individual's record in accordance with his/her request. Tort actions may also be brought for damages for the willful and intentional failure by an agency to maintain personally identifiable records accurately, relevantly and in a timely and complete fashion where an adverse determination has been made by an agency against an individual;

See The United States Attorney's Manual, Title 6, Tax Division, Section 3.350 (Oct. 1985), attached as addendum 2 to the Original Complaint, A93-A94.

If "plain Language" existed that exempted the IRS from civil liability the United States Attorney's Manual would likely have read something like, "The IRS is not liable for prosecution under the Privacy Act because they have been exempted by Congress from having to produce any records to support adverse determinations. No one should be concerned about suits against the IRS because they will be dismissed for want of jurisdiction." It would appear that the United States Attorney, clearly cognizant of the language of § 7852(e) found no such exemption for the IRS from prosecution for failure to comply with the Privacy Act. As is so clearly stated in his office manual, the Assistant United States Attorney, acting as counsel for the Appellee in this case, has redundantly exhibited through his arguments to the court that his office, and the Appellee, agree that the IRS is subject to civil prosecution under Subsection (g) of the Privacy Act.

If Congress had intended to EXEMPT the IRS from civil prosecution under the Privacy Act, Congress would have enacted an amendment to the 5 U.S.C. 552a Subsection (j)

General Exemptions and or Subsection (k) Special Exemptions, that would have provided plain language stating that the IRS was EXEMPTED from providing access to records and from civil liability for any failure by the IRS to produce any record to any individual requester. Of course, in keeping with the explanations that are normally provided in the regulations to explain the basis for the regulations and the necessity to protect some types of records from disclosure, Congress would have necessarily had to explain why it is was necessary to keep American Citizens from obtaining any IRS record pertaining personally to them that could possibly provide that American Citizen with any knowledge of the existence or possible existence of a tax liability. Due to the absurdity of the results of this notion, it is not likely that such an amendment would have found a sponsor in the Halls of Congress. The first question any clear thinking Congressman would ask is, "If you don't know if you have a tax liability or how much tax you owe, and the IRS is protected by law from ever telling you, then how or why would you ever know to pay a tax to the United

States government?" The holding of the trial courts' provides the necessary evidence for the Appellants to obtain injunctive relief to enjoin harassment and theft of property by the IRS. This result is largely due to the IRS' by inexplicable refusal to produce records to show that the Appellants are subject to their authority or that the Appellants owe a particular tax or are required to file a particular form. These omissions by the IRS have fully exposed that they hold no lawful authority over any of the Appellants.

VI.

Title XII of the Tax Reform Act of 1976 and IRC § 6103

In the Tax Reform Act of 1976, the Act that created § 7852(e), Congress spent a tremendous amount of time and energy amending IRC § 6103 to include plaint language setting forth the right of any "taxpayer" to obtain "return information" that specifically includes "tax liability." As the Appellants will demonstrate, it is not logical to presume that the same Congress, that, after doing so much to insure full disclosure of "confidential tax records," would simultaneously enact a law

in the same section of the statute that would prohibit individuals from receiving tax records. Also, in direct contrast to the complete absence of a legislative history for § 7852(e), the legislative history for §6103 demonstrating congressional intent in amending § 6103 to insure full disclosure of tax liability information to any individual that requested records, is voluminous and explicitly provides the reasons Congress requires that all confidential tax records be fully disclosed to the subject individuals by the IRS.

Title XII of the Tax Reform Act amended IRC § 6103 to provide for full disclosure of confidential tax records to individuals alleged to be subject to a federal tax. Senate Report No. 94-938, 94th Congress, 2d Session, Tax Reform Act of 1976, Report of the Committee on Finance, United States Senate on H.R. 10612, June 10, 1976, Pages 315 - 348, Section 2., reads as follows:

> 2. Disclosure of Tax Returns and Tax Return Information (sec. 1202 of the bill and sec. 6103 of the Code)
> A. In general
> Present Law p.315

In addition to the provisions of the Internal Revenue Code and the Treasury regulations, the Privacy Act of 1974 (Public Law 93-579) and the Freedom of Information Act (5 U.S.C. 552() affect the disclosure of tax information. The Privacy Act generally prohibits an agency from disclosing any of its records concerning an individual to another agency without that individual's consent. P. 316

...

Under the committee amendment, section 6103 applies to the disclosure of "return" or "return information". "Return" is defined to mean any tax or information return, declaration of estimated tax or claim for refund which, under the code, is required (or permitted) to be filed on behalf of or with respect to any person. . . .p.318

The term "return information" is to include the following data pertaining to a taxpayer: his identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments and tax payments. It also includes any particular data received by, recorded by, prepared by, furnished to, or collected by the IRS with respect to a return filed by the taxpayer or with respect to the determination 9of the existence, or possible existence of liability (including the amount of liability) for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense provided for under the code. P. 318.

1. Procedures and Records concerning Disclosure

Present Law

> Under the Privacy Act of 1974 (P.. 93-579), each Federal agency is to account for disclosures to other agencies, noting date, nature, and purpose of each disclosure and the name and address of the agency to which each disclosure is made. P.342
>
> The Privacy Act requires that each agency establish appropriate administrative, technical and physical safeguards to secure records on individuals. This requirement applies to each Federal agency that maintains a "system of records." This provision does not apply to State or local government agencies that receive Federal tax records. P. 344
>
> The IRS has no authority under the Privacy Act to audit the safeguards established by other agencies, or to stop disclosure to other agencies that do not properly maintain safeguards. P. 344.

Id. See cited pages of Senate Report No. 94-938, 94th Congress, 2d Session, Tax Reform Act of 1976, Report of the Committee on Finance, United States Senate on H.R. 10612, June 10, 1976, Page 315, Section 2 attached hereto as Addendum 7.

This recitation of Legislative History of the Tax Reform Act of 1976, as it is preserved in the Report of the Committee

on Finance, United States Senate on H.R. 10612, Title XII, Section 1202, provides us with evidence of the inextricably intertwined relationship between the Privacy Act of 1974 and IRC § 6103. Additionally, the subsequent amendment to § 6103 demonstrates Congress' commitment to proper disclosure of tax records to the individuals with a "material interest" including "return information," said definition including the word for word language of the second half of IRC § 7842(e) specifically, "the determination of the existence, or possible existence of liability (including the amount of liability) for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense provided for under the code." Clearly the definition of "return information" includes not only information that can lead to the determination of a tax liability, but it includes the actual records stating "tax liability" and the "amount of the tax liability" and the determination documents that would be the basis for these determinations.

The question is, "Did Congress intend to secret this information away and shield the IRS from having to disclose

"return information," or did Congress include "plain language" in IRC § 6103 requiring that "return information" (tax liability and the amount thereof) be disclosed upon request by the individual.

The plain language of the pertinent parts of IRC § 6103 states:

> § 6103. Confidentiality and disclosure of returns and return information
> (b) Definitions
> For purposes of this section -
> (2) Return Information
> The term "return information" means -
> (A) a taxpayer's identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments and tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other such data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return filed by the taxpayer or with respect to the determination of the existence, or possible existence of liability (including the amount of liability) for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,
> (h) Disclosure to persons having material interest
> (1) The return of a person shall, upon written request, be open to inspection by

or disclosure to -
(A) in the case of the return of an individual -

(7) Return information

Return information with respect to any taxpayer may be open to inspection or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

The dichotomy arises from the fact that IRC § 7852(e) and IRC § 6103 were enacted simultaneously by Congress in Section 1202 of the Tax Reform Act of 1976. The legislative history of IRC §6103 and the plain language of the statute clearly set forth the intent of Congress to maintain open disclosure of tax "returns" and "return information" (tax liability and determination of existence of tax liability, etc.) Within the specific parameters set forth to protect the privacy of individuals as required by the Privacy Act of 1974. Congress clearly and unambiguously mandated that the IRS must, upon written request, produce return information to the individual who has a "material interest" in the return information, thereby

providing access, without any restriction whatsoever, to every record maintained by the IRS that would "determin[e] the existence, or possible existence of liability (including the amount of liability) for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense" under the code. The Secretary has promulgated regulations to enforce § 6103 in 26 CFR 301.6103 et seq.

In direct contrast, the Friedman trial court held that IRC § 7852(e), enacted by Congress in the same legislation - absent any regulations, absent any legislative history, and containing ambiguous and unclear language - is "broadly written" to prevent the IRS from being required to produce any record that could be used to "determine the existence or possible existence of an individual's tax liability." See Order of Judge Paul Friedman, A16. The trial courts' gross error in its interpretation and application of § 7852(e) is exposed by the diametrically opposing plain language of § 6103. The ambiguous language of § 7852(e) and the trial court's holding is in direct contradiction to the plain language of § 6103 that

requires the IRS to produce information that would notice the Appellants of a tax liability and/or the source of the IRS's authority to tax the Appellants.

A simple review of the exhaustive legislative history of Title XII of the Tax Reform Act of 1976 reveals that Congress did NOT "Exempt" the IRS from the Privacy Act requirement to produce records and Congress did NOT Exempt the IRS from civil liability for failing to comply with the Privacy Act. The trial court cited NOTHING that contained plain language purporting to EXEMPT the IRS from the Privacy Act requirement to provide access to records or the Privacy Act civil remedy provisions to bring suit against the IRS to enjoin the withholding of records required to be maintained to support adverse determinations by the agency.

While the true origin and intent of § 7842(e) is certainly a mystery, it is clear that Congress never intended to enact any legislation that would EXEMPT the IRS from being compelled to produce records or from being sued for failure to comply with the mandates of Congress to maintain and produce records

that would support adverse determinations by the IRS.

VII.

Appellee's Acknowledged Subjection to the Privacy Act

As discussed supra, the Appellee, being the Secretary of the Treasury, has, in compliance with the Privacy Act, promulgated rules and regulations binding the IRS to comply with the mandates of the Act. The Appellee, in his MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANT RUBIN TO DISMISS ACTION, states:

> In the present case, the agency is the Internal Revenue Service and the requirements to access the Service's records are set forth in 31 C.F.R. § 1.26 (1997); 31 C.F.R. pt. 1, subpt. C, App. B (1998). Plaintiff must, in part, provide "the name of the system or subsystem or categories of records to which access is sought . . . [d]escribe the nature of the record(s) sought n sufficient detail to enable the Department personnel to locate the system of records containing the record with a reasonable amount of effort." 31 C.F.R. § 1.26(d) (iii) & (iv).

See Memorandum of Points and Authorities in Support of Motion of Defendant Rubin to Dismiss Action, A32.

Clearly, the Appellee's own declaration acknowledges

that if Appellants had specified a system of records, the IRS would have been duty bound by the "requirements" of the Privacy Act regulations to produce the records. Appellee further demonstrates the KNOWN duty by arguing to the trial court as follows:

> Similarly, in Lilienthal v. Parks, 574 F. Supp. 14 (E.D. Ark. 1983), the plaintiffs submitted a broad request to the Internal Revenue Service, the Service did not respond to said request, and then the plaintiffs filed suit, in part, under the Privacy Act for withholding records. The Court held that since "plaintiffs did not comply with this requirement . . .. The defendant was under no duty to grant the plaintiff's request." Id. At 18.

See Memorandum of Points and Authorities in Support of Motion of Defendant Rubin to Dismiss Action, A33.

Appellee's own arguments again demonstrate conclusively his belief, concurring with the opinion of the Lilienthal court, that if Plaintiff Lilienthal had submitted a specific request under the Privacy Act, the IRS would have been under a "duty" to grant the plaintiff's request. Clearly, the finding of the Lilienthal court only released the IRS from the

"duty" because the court found that Plaintiff Lilienthal had failed to comply with the IRS's Privacy Act regulations to specify the records sought. If the IRS had been EXEMPT from the Privacy Act access requirements or the regulations promulgated by the Appellee, the Lilienthal court would have rendered such arguments moot. However, the Lilienthal court, unlike the Bryant trial court and the Friedman trial court in these cases, issued their ruling on the arguments made by the IRS, rather than dictating to the IRS how to argue their case.

Of course, the Privacy Act contains no such requirement for anyone to specify a system of records, and, upon an irrefutable showing by the Appellants that the IRS's assertions were without merit and that the regulatory language requiring an individual to name a system of records was outside the scope of the Privacy Act, the Appellee, at the eleventh hour and with his back to the wall, decided that he was suddenly no longer bound by the Privacy Act and the regulations he has promulgated. However, the "paper trial" that the Appellee has left behind overwhelmingly reveals that he KNOWS his duty

under the Privacy Act, even though he has presently been provided asylum, and is hiding behind the erroneous ruling of the trial courts and is shunning the congressional mandates of the Privacy Act.

In keeping with the mandates of the Privacy Act at 5 USC 552a (e) (4) (A) - (1), the Appellee filed a NOTICE in the Federal Register, Volume 60, No. 217, Thursday, November 9, 1995, Notices, titled Privacy Act of 1974; Systems of Records; Notice listing the names of the 124 IRS Systems of Records on Pages 56650 - 56651 and the required detail with regard to each of the IRS Systems of Records on Pages 56777 - 56860. The Privacy Act at 5 U.S.C. 552(a) (e) (4) (E) requires that the IRS provide notice of "the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;".

In reviewing the PRIVACY ACT OF 1974 NOTICE compiled and published by the Appellee in the Federal Register to notice individuals of the IRS's "Record Access Procedures" to obtain access to the confidential tax records maintained in

each system, we find that of the 124 systems of records, every system that is NOT "exempted" from access pursuant to 5 USC 552a (j) and (k), are NOTICED that the records ARE ACCESSIBLE pursuant to Privacy Act regulations at published at 31 CFR part 1, subpart C, appendix B, just as the Appellant and Appellee redundantly argued to the trial court from the inception of these cases. To provide an example of a pertinent "system of records" purportedly applicable tothe Appellants, we show the following:

> Treasury/IRS 22.032
> SYSTEM NAME:
>
> Individual Microfilm Retention Register - Treasury/IRS
>
> CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:
>
> Categories of individuals on whom records are maintained are: For Individual Master File (IMF) registers - Individuals who file, or may be required to file, individual tax returns such as Form 1040, 1040A, or 1040EZ.
>
> RECORD ACCESS PROCEDURES:
>
> Individuals seeking access to any record contained in this system of records may inquire in accordance with instructions appearing at 31 CFR part 1, subpart C, appendix B. Inquiries should be addressed to the Director of the Internal Revenue Service servicing the areas in which the individual resides. (See IRS appendix A for addresses).

CONTESTING RECORDS PROCEDURES:

26 U.S.C. 7852(e) prohibits Privacy Act amendment of tax records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

NONE.

See pertinent pages of Federal Register, Volume 60, No. 217, Thursday, November 9, 1995, Notices, titled Privacy Act of 1974; Systems of Records; Notice attached hereto as Addendum 8, and fully incorporated herein by reference.

A review of 31 CFR part 1, subpart C, appendix B, shows the Appellee's own replete acknowledgment that the IRS is subject to the mandates of the Privacy Act, to wit:

> 31 CFR Part 1 Subsection(c) Appendix B
> APPENDIX B-INTERNAL REVENUE SERVICE
>
> 1. Purpose. The purpose of this section is to set forth the procedures that have been established by the Internal Revenue Service for individuals to exercise their rights under the Privacy Act of 1974 (88 Stat. 1896) with respect to systems of records maintained by the Internal Revenue Service, including the Office of the Chief Counsel. The procedures contained in this section are to be promulgated under the authority of 5 U.S.C. 552a(f). The procedures contained in this section relate to the following:
>
> (a) The procedures whereby an individual can be notified in response to a request if a system of records named by the individual contains a record pertaining to such individual (5 U.S.C. 552a(f)(1)).

(b) The procedures governing reasonable times, places, and requirements for identifying an individual who requests a record of information pertaining to such individual before the Internal Revenue Service will make the record or information available to the individual (5 U.S.C. 552a (f)(2)).
(c) The procedures for the disclosure to an individual upon a request of a record of information pertaining to such individual, including special procedures for the disclosure to an individual of medical records, including psychological recors. (5 U.S.C. 552a (f)(3)).
(d) The procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the Internal Revenue Service of an initial adverse agency determination, and for whatever additional means may be necessary for individuals to be able to exercise fully their right under 5 U.S.C. 552a (5 U.S.C. 552a (f)(4). [bolded emphasis added].

See 31 CFR part 1, subpart C, appendix B attached hereto as Addendum 2.

A review of 31 CFR 1.26, shows the Appellee's additional and complete memorialization of the Privacy Act requirements for the IRS to provide access to records, to wit:

1.26 Procedures for notification and access to records pertaining to individuals-format and fees for request for access.
(a) Procedures for notification and access. Each component shall establish, in accordance with the requirements of 5 U.S.C. 553, and set forth

in the appendix to this subpart applicable to such component procedures whereby an individual can be notified, in response to a request, if any system of records named by the individual contains a record pertaining to that individual. In addition, such procedures shall set forth the requirements for access to such records. As a minimum such procedures shall specify the times during, and the places at which access will be accorded, together with such identification as may be required of the individual before access. (See 5 U.S.C. 552a(f)(1), (2) and (3)).

(b) Access. Each component in accordance with the procedures prescribed under paragraph (a) of this section, shall allow an individual to gain access to records or to any information pertaining to such individual which is contained in the system of records upon request. The individual shall be permitted to review the record and have a copy made of all or any portion of the record in a form that is comprehensible. The individual will also be permitted to be accompanied by any person of the individual's choosing to review the record, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence. (See 4 U.S.C. 552a(d)(1). [bolded emphasis added]

See 31 C.F.R. 1.26 attached hereto as Addendum 3.

Clearly, the PRIVACY ACT NOTICE, published in the Federal Register by the Appellee, coupled with 31 CFR part 1,

subpart C, appendix B and 31 CFR 1.26 both promulgated by the Appellee, provides ample evidence of the Appellee's acknowledgment that the IRS is subject to the mandates of the Privacy Act. A review of the entirety of these 83 pages of "notices" filed in the Federal Register reveals that over 100 of the IRS records systems contains the requirement to provide access to the records as REQUIRED under the Privacy Act regulations at 31 CFR part 1, subpart C, appendix B. The IRS states in its own published notice that they claim NO EXEMPTION to the requirement of the Privacy Act with regard to producing records containing "return information" or any type of "tax data" that would reveal the existence or possible existence of a tax liability or the amount thereof. It was not until March 23, 1998 that the Appellee suddenly decided that the IRS could not supply records that might "directly or indirectly" lead to the discovery of a existence or possible existence of a tax liability. The two trial courts have failed to reveal how the Appellee and the IRS came to be EXEMPT from regulations promulgated by the Appellee

himself. "Once promulgated, these regulations, called for by the statute itself, have the force of law . . . just as if the details had been incorporated into the congressional language." United States v. Mersky, 361 US 431, 438 (1960). It is this complete absence of reasoning and logic that most notably reveals the absurdity of the erroneous findings of the trial courts. The IRS is in violation of federal law. The order of the Bryant trial court and the order of the Friedman trial court effectively sanction these violations of federal law.

CONCLUSION

The right to receive information is a necessary predicate to the Appellants' meaningful exercise of their rights of speech, press, and political freedom. Appellants have the absolute right to have access to any records the IRS is required to maintain with regard to the Appellants that 1) would show the source of the authority of the IRS over the Appellants, 2) would show the Appellants whether they do or do not owe a tax to the United States government, and/or 3) would show the Appellants that they are required to file a specific form to report a particular

tax for which they have been determined to be liable. The Friedman trial court erred in failing to find that the Appellee's application of IRC § 7852(e) results in a constitutional deprivation of Appellants' First Amendment right to receive information.

The Appellants have the absolute right to petition the government to redress a grievance when the government violates their constitutionally protected right to receive information and right to free speech. The Friedman trial court erred in failing to find that Appellee's application of IRC § 7852(e) results in a constitutional deprivation of Appellants' First Amendment right to petition the government for a redress of grievance.

It is a significant part of IRC § 7842(e) that targets both the Appellants' protected right to receive information, to speak freely and to petition the government to redress a grievance and there exists no satisfactory way of severing the law's constitutional from it unconstitutional applications so as to excise the latter clearly in a single step from the law's reach.

Therefore, IRC § 7852(e) is VOID FOR OVERBREADTH. The Friedman trial court erred in failing to find that IRC § 7852(e) is VOID for OVERBREADTH.

The Appellee himself has redundantly argued to the trial court that the IRS is bound by regulations published at 31 C.F.R. § 126 (1997); 31 C.F.R. pt. 1, subpt. C, App. B (1998) and 26 CFR 601.501-504 that explicitly set forth the requirement of the IRS to produce confidential tax records pursuant to the mandates of the Privacy Act. Regulations, that are inextricably intertwined with the statute, have the force and effect of law and are binding on the agency. "Once promulgated, these regulations, called for by the statute itself, have the force of law . . . just as if the details had been incorporated into the congressional language. United States v. Mersky, 361 US 431, 438 (1960). It is not optional for the IRS to decide whether they do are do not want to provide access to records. The Privacy Act regulations binding on the IRS require that they provide access to records. Failure to provide access is a violation of federal law. The erroneous holdings of

the lower tribunals effectively sanction and condone IRS violations of federal regulations, and thus, violations of the Administrative Procedures Act, the Federal Register Act and the Privacy Act, as well as being in direct conflict with the findings of the Supreme Court of the United States in Merskey. A trial court ruling that effectively sanctions and even encourages violations of federal law cannot be allowed to stand. The Friedman trial court erred in finding that the Internal Revenue Service is not bound by regulations promulgated and published in the Federal Register pursuant to the mandates of the Privacy Act of 1974.

The Friedman trial court conceded that the IRS was subject to the Privacy Act requirements to promulgate regulations and to provide access to records, but then stated that if the IRS failed to abide by the regulations, or to provide access to records, the IRS was EXEMPTED from civil prosecution. This fatally defective finding and the subsequent grim reality of the Friedman Court's holding is that it has place d the IRS above the law. The collective trial courts' holding

have effectively sanctioned the IRS' policy and practice to deprive Appellants and the American Citizens of their right to receive information to protect themselves from government tyranny and IRS abuses. The Friedman trial court erred in finding that the Internal Revenue Service is not bound by the Privacy Act of 1974.

IRC § 7852(e) is ambiguous and unclear. " A law is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application." Smith v. Goguen, 415 U.S. 566 (1974). Rather than striking down § 7852(e) due to its due process violations resulting from § 7852(e)'s want of plain language, the trial courts opted to "guess" at its meaning. The Friedman trial court erred in failing to find that IRC § 7852(e) is hopelessly VOID for VAGUENESS.

Because the application of § 7852(e) produces such "an absurd result," (See Mova Pharmaceutical Corp. v. Shalaia, 1998 WL 168710 at *7), the trial court should have looked at the obvious and compelling evidence that Congress did NOT

intend the code section to be interpreted in such a manner. The trial court erred in failing to show that Congress intended to amend the Internal Revenue Code in a manner that would shield the IRS from being required to comply with Privacy Act requirements to provide access to individuals records.

The Legislative History of The Tax Reform Act of 1976 illuminates three very important facts that assist in reviewing the congressional intent (or lack thereof) for § 7852(e). First, Section 1202 of the Tax Reform Act is a revealing and abundant compilation of congressional activity demonstrating Congress' undeniable intent to amend the Internal Revenue Code § 6103 to insure full disclosure of confidential tax information to individuals with a "material interest." Second, the complete absence of any reference in Section 1202, the section in wich IRC § 7852(e) finds it ambiguous language that would appear in the Tax Reform Act of 1976 that would drastically amend the Internal Revenue Code in such a way as to undermine all their work done in the same section of the same Act to insure that amendments to § 6103 would guarantee

full disclosure of tax information. The fact that there does not exist even a scintilla of language relevant to § 7852(e) is overwhelmingly persuasive evidence that Congress had not intention to include it in the Act. Third, there is no language in the Legislative History whatsoever that suggests that the IRS is in any way EXEMPTED from the mandates of the Privacy Act of 1974. To the contrary, the legislative history of Section 1202 of the Tax Reform Act of 1976 is replete with references to the Privacy Act mandates applicable to the IRS, most especially with regard to maintenance of records and access to records. The trial court erred in finding that the Internal Revenue Service is EXEMPT from civil prosecution for violations of the Privacy Act of 1974. The Friedman trial court also erred in failing to show that Congress intended to amend the Internal Revenue Code in a manner that would shield the IRS from being required to comply with Privacy Act requirements to provide access to individuals records.

The Appellee's PRIVACY ACT NOTICE published in the Federal Register pursuant to the mandates of the Privacy

Act is replete with the Appellee's own stated requirements that the IRS must provide access to records pursuant to Privacy Act regulations. This further exemplifies the voluminous evidence that the Appellee knows and has always known that the IRS is subject to the requirements of the Privacy Act and is civilly liable for violations of the Privacy Act.

Due to the complete absurdity of the Friedman court's holding, Appellants request one last review of the trial court's holding:

> The language of Section 7852(e), however, is written broadly to cover any "determination of the existence or possible existence" of an individual's tax liability; the source of the IRS's authority to tax a particular individual is part of the determination of the individual's tax liability and therefore falls within the proscriptions of Section 7852(e).

See Order of Judge Friedman, A16.

Preventing any Citizen from determining the source of the authority of the IRS to tax them is tantamount to the doctrine of Lex Rex, the "divine right of kings" - the king can do no wrong. In the United States of American, there the

PEOPLE are the kings. The government is of the People, created by the People, and exists for the People. The government cannot dictate that the People must perform some act or are subject to the authority of a federal agency simply because the government said so. If a requirement was not enacted by the representatives of the People pursuant to authority granted by the Constitution, it is a nullity and has no force or effect of law.

The Friedman trial court's ruling effectively condones the unconscionable IRS abuses of the American people. The Constitution for the United States of America was drafted and ratified to guarantee the American people. The Constitution for the United States of America was drafted and ratified to guarantee the American People that they would never again be subjected to such oppressive and despotic forms of tyranny. The trial court holding that a Citizen has no right to even KNOW the source of the IRS's authority to tax him, much less if he has a tax liability, cannot stand. This illogical conclusion leads to the Friedman court's holding that the IRS is protected

from providing any information whatsoever that might possibly allow the Appellants to learn of the existence or possible existence of a tax liability. The result of this holding is that neither the Appellants, nor any American Citizen, can ever have any knowledge that they do or do not owe a tax to the United States government. Further, no Appellant could ever be held accountable for failure to dispose of any tax liability that the IRS has refused to disclose. Additionally, no Appellant has nay means or method by which to determine what form they might be required to file. While the trial courts' holding guarantees that the IRS can continue to abuse the American People with impunity, it also guarantees that no Appellant, or any other American Citizen can ever again be prosecuted for "willfully attempting to defeat or evade a tax" because the Appellants cannot possibly gain or have any knowledge that they owe or might owe a tax.

The holdings of the Friedman trial court and the Bryan trial court are without merit and seriously in error. The result of the holdings of these courts is that a federal agency has been

placed above the law causing an unconscionable deprivation of the constitutionally guaranteed rights of the Appellants and guaranteeing continued despotic abuses of the IRS against the Appellants and the Citizens of the United States of America.

Internal Revenue Code Section 7852(e) is REPUGNANT to the Constitution for the United States of America. The trial courts erred in failing to find that the application of IRC § 7852(e), resulting in constitutional deprivations of Appellants' rights, is REPUGNANT to the Constitution, and is, therefore, NULL and VOID.

Both of the trial courts erred in finding that IRC § 7852(e) bars a Privacy Act suit brought under Subsections (g)(1)(B) of 5 U.S.C. 552a for failure to provide access to records in violation of Subsections (d)(1) fo 5 U.S.C. 552a.

WHEREFORE, the Appellants request that the Court of Appeals enter an Order holding that the orders of trial court Judge William B. Bryant and trial court Judge Paul L. Friedman are 1) in error and therefore vacated, 2) remanded to the trial courts for further consideration, 3) directing the trial courts

issue a declaratory judgment that the IRS is bound by the mandates of the Privacy Act, 4) directing the trial court to GRANT the Injunctive Relief sought by the Appellants to enjoin the withholding of IRS records from the Appellants, and 5) directing the trial courts to issue a judgment in favor of the Appellants, in addition to the declaratory and injunctive relief sought, including but not limited to damages, attorney fees and costs of court for both the district court suits and the appeal, and all other relief to which the Appellants are justly entitled under the law.

Respectfully submitted,

J. Hamilton McMenamy
Texas Bar No. 1379000
Fed I.D. #75-2680869
P. O. Box 7649
Pasadena, Texas 77508
713-472-4010
Fax 713-475-0521
Attorney for Appellants

Fred A. Ohlinger
Florida Bar No. 196830
Fed I.D. #59-1004604
P. O. Box 7649
Pasadena, Texas 77508
713-472-4010
Fax 713-475-0521
Attorney for Appellants

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